Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

EDWARD OVERMAN,

Petitioner,

v.

ANDREW TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When considering the "totality of the circumstances" under the Eleventh Circuit's standard of "arguable probable cause," is it appropriate to ignore knowing, willful and deliberate misconduct by a law enforcement officer including falsifying a probable cause affidavit, lying to supervisory personnel and lying to the prosecuting agency, when considering the defense of qualified immunity.

PARTIES TO THE PROCEEDINGS BELOW

The Petitioner in this Court, Edward Overman, was the plaintiff in the District Court. Overman was also an appellant in the Court of Appeals. The Respondent Andrew Taylor was a defendant in the District Court. He was also an appellee in the Court of Appeals. Kenneth C. Jenne and Frederick Jones were defendants in the District Court and were appellees in the Court of Appeals. Petitioner, however, does not challenge the District Court's and Eleventh Circuit's rulings in their favor.

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Petitioner, Edward Overman, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Order of the United States Court of Appeals for the Eleventh Circuit Denying Petition for Rehearing En Banc dated and filed July 12, 2004, is attached as Appendix E. The opinion of the United States Court of Appeals for the Eleventh Circuit (Birch, Dubina and Cox), affirming the District Court's ruling is unpublished, and is included as Appendix A. The opinion of the United States District Court for the Southern District of Florida (Huck, J.) granting Respondent Taylor's Renewed Motion for Summary Judgment is not reported, and is included as Appendix B. The opinion of the United States Court of Appeals for the Eleventh Circuit (Tjoflat, Birch and Cox) vacating the Order of the District Court and remanding, is unreported, and is included as Appendix C. The opinion of the United States District Court for the Southern District of Florida (Ferguson, J.), granting Jenne and Jones's Motions for Summary Judgment and partially granting and denying Respondent Taylor's Motion for Summary Judgment is unreported, and is included as Appendix D.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on May 7, 2004. Petitioner's timely Petition for Rehearing En Banc was denied on July 12, 2004. (Appendix E). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

On August 17, 1997, the Petitioner Edward Overman was stopped and arrested by Respondent Andrew Taylor, a deputy sheriff with the Broward County Sheriff's Office, Florida, for a number of traffic infractions and driving under the influence of alcohol. The Petitioner presented clear and objective evidence that there was no reasonable basis for said stop and arrest, as he had not violated any traffic infractions, nor was he driving while under the influence of alcohol.

In evaluating the applicability of the qualified immunity defense, the lower courts accepted none of the objective evidence of the non-moving party. The objective evidence demonstrated that Respondent Taylor's conduct demonstrated a willful and deliberate violation of the constitutional rights of the Petitioner. The objective evidence showed an officer that sought to cover-up his misconduct. Respondent's fabricated probable cause affidavit concerning the events of August 17, 1997, failed to disclose the following: (1) that his sole source of information with respect to Petitioner's conduct on that evening came from a known former disgruntled employee who had been fired for misconduct by the Petitioner, who at the time was the Police Chief for the City of Oakland Park, Florida; (2) that at no time did Taylor personally verify any of the information provided to him by said individual; (3) that he observed the Petitioner driving for over three miles without observing any traffic infractions; (4) that he cut off surveillance of Overman, only to resume following Overman, at the insistence of Washington [the disgruntled former employee]; (5) that, at the time of the stop, Respondent was aware that the person he was stopping was the Police Chief of the City of Oakland Park and that he was less than a mile from his home; (6) that the complete

videotape of the traffic stop demonstrated that no traffic infractions had occurred and that Petitioner was not under the influence of alcohol. Additional evidence, which was presented at the summary judgment stage, also included an incomplete videotape of the incident intentionally provided by Respondent.

Not only did Taylor lie in his probable cause affidavit, he subsequently lied to other officers, supervisors and prosecutors concerning the events of that evening. What Petitioner demonstrated by objective evidence was that Andrew Taylor, as a deputy sheriff with the Broward County Sheriff's office, abused his power in his stop and arrest of the Petitioner. The objective evidence demonstrated that Respondent's probable cause affidavit consisted of lies and deliberate omissions concerning material facts and circumstances within Respondent's knowledge.

Based upon said evidence, no reasonable officer with Taylor's knowledge would have determined that probable cause or even reasonable suspicion existed in stopping and arresting the Petitioner. Acknowledging that he had deliberately omitted and lied about the circumstances surrounding the incident, Taylor argued that said lies and omissions were irrelevant as he had "established his own probable cause." Of course, Taylor's probable cause failed to disclose his abuse of authority in fabricating traffic infractions, fabricating Petitioner's conduct with respect to the sobriety tests, and ignoring independent tests which clearly demonstrated that the Petitioner was not under the influence of alcohol.

Taylor's reasonable suspicions were not based upon the objective facts and circumstances observed by him or

based upon reliable information given to him by others. The Petitioner's evidence demonstrates conduct by Taylor that he consciously and deliberately covered up material information and deliberately ignored the totality of the circumstances surrounding the stop and arrest of the Petitioner in order to falsely create probable cause.

The objective evidence demonstrates that he did not act as a reasonable officer under the circumstances would act. Instead, the evidence demonstrated that he abused his lawful authority by: (1) deliberately ignoring and misrepresenting the facts; (2) failing to do any reasonable investigation and knowingly relying on untrustworthy information; and (3) fabricating his probable cause affidavit in an attempt to cover-up his misconduct.

Based upon the evidence presented, it cannot be concluded as a matter of law that probable cause existed to arrest Edward Overman. Petitioner presented objective evidence that at the time of the stop and subsequent arrest, he had violated no traffic laws and he was not driving under the influence of alcohol or drugs.

Contrary to the findings of the lower court, the Petitioner demonstrated by clear and objective evidence that Taylor knowingly violated the law, thereby precluding the availability of the qualified immunity defense to him. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

REASONS FOR GRANTING THE PETITION

I. The Eleventh Circuit's "arguable probable cause" standard of evaluating a government official's right to the qualified immunity defense, is in conflict with the dictates of this Court.

The Court of Appeals for the Eleventh Circuit's unpublished per curium decision of May 7, 2004, misinterprets what constitutes "arguable probable cause" for the defense of qualified immunity. Its opinion provides qualified immunity for conduct that was knowingly illegal, as opposed to the appropriate standard of mistake and is, therefore, in conflict with the dictates of this Court. *Saucier v. Katz*, 121 S. Ct. 2151 (2001); *Hope v. Pelzer*, 122 S. Ct. 2508 (2002); *Malley*, *supra*. In *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), this Court held that qualified immunity precludes a government official from being held liable for unconstitutional conduct unless the official violates "clearly established statutory or constitutional rights of which a reasonable person would have known." The qualified immunity defense is to protect officers from liability for making reasonable mistakes. It is not to be used to protect officers who deliberately abuse their lawful authority. *Malley*, *supra*

In the instant case, the lower courts looked to what the Respondent allegedly and subjectively could have believed in determining that he was entitled to qualified immunity, ignoring the misconduct of Taylor. The Eleventh Circuit's "arguable probable cause" analysis has thus shifted from ". . . whether the officers' actions were 'objectively reasonable' under the facts and circumstances confronting him," to what the officer in question might subjectively have

believed. *Graham v. Connor*, 109 S. Ct. 1865, 1872 (1989); Appendix B, at 21a.

In the district court opinion, which was affirmed by the Court of Appeals, the court examined the evidence from the view of the Respondent. According to the district court, the qualified immunity defense ". . . does not require overwhelmingly convincing evidence, only 'reasonably trustworthy information.'" (Internal citations omitted). *See* Appendix B, at 18a. The district court then went on to reason that:

> The question of whether there are material factual disputes that would preclude a finding of actual probable cause is a very close one, since Plaintiff has raised some factual questions as to whether the information from Washington was sufficiently reliable, whether Overman actually committed the minor traffic infractions for which he was cited, whether Taylor properly administered the roadside sobriety tests, and whether Overman displayed sufficient overt signs of impairment. *However, the Court need not resolve this difficult question, because the record contains no genuine issue of material fact that would preclude a ruling on whether Taylor had arguable probable cause.*

(Emphasis added). *See* Appendix B, at 20a.

In making such a finding, the district court relied upon the statements of the Respondent, ignoring the evidence presented by the Petitioner. "[T]he court finds that Defendant has demonstrated sufficient undisputed facts upon which this court can conclude that an officer could reasonably have

believed he had probable cause sufficient to arrest Overman." (Emphasis added). *See* Appendix B, at 20a-21a. The lower courts could not have reached this conclusion without believing Taylor's "facts" and ignoring his misconduct.

According to the district court:

> Especially when taken in view of the *totality of the circumstances* presented here, these various signs and symptoms of alcohol impairment are sufficient to establish arguable probable cause since a reasonable officer faced with the same circumstances could have believed that there was probable cause to conclude that Overman was impaired.

(Emphasis added). *See* Appendix B, at 25a. Why did the lower courts believe Taylor? Taylor's probable cause affidavit is rife with false statements. Taylor was fired over his misconduct. Why did the lower courts rely on the false statements of Taylor as to "various signs and symptoms of alcohol impairment?" The breath test, other officers who observed Overman at the time of the arrest, and the experts all made it clear that Mr. Overman was not impaired. The lower court's conclusion as to the "various signs and symptoms of alcohol impairment" is in direct contradiction to the evidence presented by Overman. Isn't this a material disputed fact?

In making such a finding, the court necessarily was required to ignore the true "totality" of the circumstances, as a reasonable officer in determining probable cause at the time of the incident would also be fully aware of the circumstances of the stop and arrest, i.e., an unreliable informant, no

observance of any traffic infractions, sobriety tests that were improperly given and interpreted, and a scientific finding which under Florida law stated that "if there was at that time a blood-alcohol level or breath-alcohol level of 0.05 or less, it is presumed that the person was not under the influence of alcoholic beverages to the extent that his or her normal faculties were impaired." (§ 316.1934(2)(a), Fla. Stat.).

The Court of Appeals of the Eleventh Circuit's analysis ignores the logical interpretation of facts, thereby granting qualified immunity for conduct which was deliberate and not merely a mistake. "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176, 69 S. Ct. 1296, 1311 (1949). "In dealing with probable cause . . . as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* at 1310. The opportunity for qualified immunity in the absence of probable cause already allows for mistakes, therefore there is no need to introduce the middle tier of "arguable probable cause", which invites subjective analysis while ignoring objective evidence.

With respect to the fabricated evidence by the Respondent, the district court acknowledged that:

> [i]t is undisputed that Taylor did not reveal everything that might have been relevant to this case, either in the probable cause affidavit or

> during a meeting with the SAO [state attorney's office] on August 18, 1997. He did not disclose that he had initially received a tip from Washington, that he had waited outside of Cheers for nearly forty minutes, and that he had followed Overman for over three miles without observing traffic infractions or signs of impairment. Taylor claims he did not identify Taylor [sic] as a witness in the probable cause affidavit because he did not believe Washington was a witness. In response to questions asked during the meeting with the SAO, Taylor **falsely** stated that he did not know that Overman was the Chief of the Oakland Park Police Department until after the arrest, denied any knowledge of Washington, and failed to disclose Washington's involvement in the arrest, **stating instead that Taylor had come upon Overman innocently while patrolling**.

(Emphasis added). *See* Appendix B, at 14a.

Despite such a finding, the district court determined that said evidence, i.e., lies and omissions in the probable cause affidavit, sobriety tests being given improperly, relying upon untrustworthy information, failing to properly investigate and presenting the court with an abbreviated videotape of Respondent's stop of Edward Overman, was too subjective to be considered in determining "arguable probable cause." According to the district court:

> Because all of these inferences which could raise a question of whether there was even arguable probable cause require consideration of Taylor's subjective intent, they cannot form the basis for a

> denial of qualified immunity under Eleventh Circuit precedent. Thus, for the foregoing reasons, the Court determines that Taylor did have arguable probable cause for this arrest, and grants Defendant Taylor's Renewed Motion for Summary Judgment on the ground that Taylor is entitled to qualified immunity.

See Appendix B, at 27a.

The Court of Appeals for the Eleventh Circuit, by affirming the district court's opinion, has not only condoned the misconduct of the Respondent, it accepted as undisputed a deliberately slanted version of the evidence to create "arguable probable cause." Instead of viewing all of the objective evidence from the standpoint of a reasonable officer possessed with the same knowledge as the Respondent, the Court of Appeals and the district court, claiming that subjective inferences could possibly be drawn from the objective evidence, eliminated material facts and knowledge known to the officer.

Based upon all of the evidence known to Respondent at the time of the stop and arrest, no reasonable officer could have believed that probable cause existed to arrest the plaintiff. According to the probable cause affidavit, Petitioner "failed to come to a complete stop." When this statement in the probable cause affidavit was proven to be false, Respondent subsequently alleged that Petitioner had failed to stop before the white line. To support this contention, Respondent presented to the lower courts an abbreviated version of the videotaped stop of the Petitioner. Only after discovery was completed and following numerous requests

spanning four years was Petitioner provided with a complete videotape of the stop. Petitioner presented this videotape to the district court. It clearly demonstrated that Petitioner had in fact stopped prior to the white line. The district court ignored this objective evidence. Instead the district court stated:

> Plaintiff argues, however, that Taylor' initial stop of Overman for the traffic infractions with which he was charged was illegal because Overman did not actually commit those traffic infractions. Even if Plaintiff's contentions in this regard are true, it is clear *Taylor could reasonably have believed* he had probable cause to stop Overman for what could fairly have been seen as a traffic infraction.

(Emphasis added). *See* Appendix B, at 21a. Thus, Mr. Overman presented evidence that he was illegally stopped for an illegal purpose, and the lower court, *believing Taylor*, concluded that "Taylor could reasonably have believed he had probable cause."

Such a statement ignores all evidence of manufacturing evidence and the lies concocted to support his false probable cause affidavit. How can one reasonably state that Andrew Taylor could have reasonably believed he had probable cause, when the evidence clearly demonstrates that each statement in his probable cause affidavit was a lie. If he had truly, mistakenly believed that he had probable cause, it would have been unnecessary for him to have falsified a probable cause affidavit. This patent truth was considered irrelevant in the lower courts.

> To determine whether an officer had probable cause to make an arrest, a court must examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause. *Ornelas v. United States*, 517 U.S. 690, 696.

Maryland v. Pringle, 124 S. Ct. 795, 797 (2003). "Probable cause existed if 'at the moment the arrest was made . . . the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing' a crime had been committed." *Saucier*, *supra* at 2164 (quoting *Beck v. Ohio*, 379 U.S. 89, 91 (1964)); *Hunter v. Bryant*, 112 S. Ct. 534, 538 (1991).

Petitioner provided objective evidence that Respondent's probable cause affidavit was not based upon the evidence presented to him at the time of the incident and, in fact, was a fabrication of the evidence. "'The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails.'" (Internal citation omitted). *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). Qualified immunity does not suggest or demand that an officer be given the defense for conduct which is clearly illegal and in violation of a citizen's constitutional rights. It is, after all, to protect "all but the plainly incompetent or one who is knowingly violating the federal law." *Malley*, *supra* at 349. The qualified immunity defense is to preclude punishment for a mistake. *Id.* at 353.

> A qualified immunity analysis] must charge [the officer] with possession of all the information reasonably discoverable by an officer acting reasonably under the circumstances . . . '[A] police officer may not close his or her eyes to facts that would help clarify the circumstances of an arrest.' *BeVier v. Hucal*, 806 F.2d 123, 128 (7th Cir. 1986).

Sevigny v. Dicksey, 846 F.2d 953, 960 (4th Cir. 1988).

In the instant case, Taylor's conduct was not driven by a requirement to make a split second decision. He had ample time to consider the appropriate conduct under the circumstances. It can be reasonably inferred from his fabrication of the probable cause affidavit and his lies to officers, supervisors and prosecutors that he was fully aware that his conduct was in violation of Petitioner's constitutional rights and an abuse of his power as a deputy sheriff.

While constitutional reasonableness of a police investigation does not depend on an officer's subjective intent or ulterior motive in conducting an investigation, it does not follow that an officer may selectively investigate a matter, and then be able to argue that he has probable cause. *Whren v. United States*, 517 U.S. 806, 812-13 (1996); *Sevigny*, *supra* at 957.

The qualified immunity defense does not change the settled standard of summary judgment under Rule 56, i.e., that disputed factual matters preclude summary judgment. *Behrens v. Pelletier*, 116 S. Ct. 834 (1996); *Hunt v. Cromartie*, 526 U.S. 541, 550-55 (1999); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In making its determination, neither

the district court nor the Court of Appeals may weigh the evidence, make credibility determinations or selectively ignore evidence in direct conflict and contrary to the evidence presented by the moving party, Andrew Taylor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *Hunt, supra*; *Johnson v. Jones*, 515 U.S. 304 (1995); *Celotex, supra*; *Crawford-El v. Britton*, 523 U.S. 574, 118 S. Ct. 1584 (1998); *Franks v. Delaware*, 98 S. Ct. 2674 (1978).

The law is clearly established that manufacturing evidence and withholding evidence for the purpose of creating probable cause is a violation of a citizen's constitutional rights. *See Butz v. Economou*, 438 U.S. 478, 493-94 (1978); *Hinchman v. Moore*, 312 F.3d 198, 205-06 (6th Cir. 2002); *Castellano v. Fragozo*, 311 F.3d 689, 704-05 (5th Cir. 2002), *reh'g en banc granted*, 321 F.3d 1203 (5th Cir. 2003); *Moran v. Clarke*, 296 F.3d 638, 647 (8th Cir. 2002); *Paine v. Lompoc*, 265 F.3d 975 (9th Cir. 2001); *Holmes v. Kucynda*, 321 F.3d 1069 (11th Cir. 2003); *Riley v. City of Montgomery, Ala.*, 104 F.3d 1247, 1253 (11th Cir. 1997); *Smith v. Springer* 859 F.2d 31 (7th Cir. 1988).

In granting Respondent qualified immunity, the Court of Appeals ignored "clearly established" law and clear evidence of abuses of lawful authority. This Court, in requiring an "objectively reasonable" standard in evaluating an official's conduct, certainly does not require or invite a court to ignore evidence of obvious deliberate acts of misconduct. To do so would render the principles behind qualified immunity meaningless and, would provide protection for officials who willfully seek to abuse their authority for their own self interests.

Let it not be forgotten that Respondent's role as a law enforcement officer is to search ". . . for the clues and corroboration that might give him probable cause to recommend that a suspect be arrested." *Kalina v. Fletcher*, 522 U.S. 118, 126 (1997). In the instant case, Respondent stated in his probable cause affidavit that: "I swear the above statement is correct and true to the best of my knowledge and belief." The evidence presented by Petitioner demonstrates that this statement along with every other statement in his affidavit was false. The Fourth Amendment demands a factual showing sufficient to comprise probable cause, with the obvious assumption that there will be a truthful showing. "[I]t is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant as true." *Franks*, *supra* at 2685; *Kelly v. Curtis*, 21 F.3d 1544, 1555 (11th Cir. 1994); *Jones v. Cannon*, 174 F.3d 1271, 1285 (11th Cir. 1999); *Malley*, *supra* at 344-45. What the evidence demonstrates is that a reasonably prudent officer would know that Overman had not committed even a "very minor criminal offense" and, therefore, arresting him would be a violation of his constitutional rights. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

For courts to interpret the qualified immunity defense on an "arguable probable cause" standard which selectively sifts through the evidence to arrive at a sanitized version of the facts flies in the face of the precedent set by this Court.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED MAY 7, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-16296
Non-Argument Calendar

D. C. Docket No. 00-06434-CV-PCH

EDWARD OVERMAN,

Plaintiff-Appellant,

versus

BROWARD SHERIFF'S OFFICE,
Kenneth C. Jenne, II, in his official capacity
as the Sheriff of Broward County, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(MAY 7, 2004)

Before BIRCH, DUBINA and COX, Circuit Judges.

PER CURIAM:

Appendix A

Edward Overman appeals the district court's grant of summary judgment in favor of all of the defendants in this case. We have carefully considered the briefs and relevant parts of the record, and discern no reversible error. The district court properly granted Defendant Taylor summary judgment on the basis of qualified immunity because it correctly concluded that Taylor had arguable probable cause to arrest Overman for DUI. And, assuming arguendo that the arrest initiated prosecution against Overman, Overman's malicious prosecution claim fails because the arrest was supported by arguable probable cause. Likewise, the district court properly granted Defendant Jones summary judgment on Overman's malicious prosecution claim because there was no evidence that Jones acted with malice. Finally, the district court properly entered summary judgment for Defendant Jenne on Overman's two claims against Jenne: the negligence claim failed because there was no evidence that Jenne was negligent, and the § 1983 claim failed because there was no evidence of a custom or policy of malicious prosecution.

AFFIRMED.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA GRANTING DEFENDANT, ANDREW TAYLOR'S RENEWED MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENTS, AND DENYING PLAINTIFF'S MOTIONS FOR RECONSIDERATION DATED NOVEMBER 14, 2003

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 00-6434-CIV-HUCK/TURNOFF

EDWARD OVERMAN,

Plaintiff,

vs.

KENNETH C. JENNE, II, in his official capacity as the Sheriff of Broward County, et al.,

Defendants.

ORDER GRANTING DEFENDANT, ANDREW TAYLOR'S RENEWED MOTION FOR SUMMARY JUDGMENT, GRANTING PLAINTIFF'S MOTION TO SET ASIDE JUDGMENTS, AND DENYING PLAINTIFF'S MOTIONS FOR RECONSIDERATION

THIS CAUSE is before the Court on remand from the Eleventh Circuit for reconsideration of the denial of qualified immunity as to Defendant Taylor on a false arrest count and

on Defendant, Andrew Taylor's Renewed Motion for Summary Judgment, filed September 19, 2003 (DE # 250), Plaintiff's Motion to Set Aside Judgments Entered on October 21, 2002, with Respect to Defendants Taylor, Jones, and Jenne, filed September 19, 2003 (DE # 253), and Plaintiff's Motions for Reconsideration of the District Court's September 30, 2002 Order as to Defendants Taylor and Jones and as to Defendant Jenne, filed September 19, 2003 (DE ## 251, 252). After consideration of the parties' respective legal memoranda, and being otherwise duly advised, the Court finds as follows.

Procedural History

On March 28, 2000, Plaintiff Overman, who was Chief of Police for Oakland Park, Florida, filed his Complaint in this matter alleging that he was deprived of his constitutional rights by five named Defendants from the Broward County Sheriffs Office ("BSO"), acting in their official or individual capacities or both, when he was arrested on September 17, 1997, for driving under the influence. Specifically, Plaintiff alleged one count under 42 U.S.C. § 1983 for false arrest and false imprisonment against the arresting officer, former BSO Deputy Andrew Taylor, three counts of malicious prosecution under § 1983 against Taylor and his immediate supervisors, BSO Deputies Frederick Jones and Kevin Tyrie, and four counts for state law and § 1983 constitutional claims against the Broward County Sheriff, Defendant Kenneth Jenne, and the former Acting Sheriff of Broward County, Defendant Susan McCampbell, for negligence and deliberate indifference in selection, appointment, training, supervision, and retention of deputies and for permitting a pattern and

practice of false arrests and illegal detentions and prosecutions. Amended Complaint ¶¶ 60-123 (DE # 17). After the Complaint survived Defendants' Motions to Dismiss, Defendants moved for summary judgment at the close of discovery in September 2001. (DE ## 84, 93, 94). On October 12, 2001, Plaintiff voluntarily dismissed Defendants Tyrie and McCampbell. (DE ## 118, 146). A hearing was held on the remaining Defendants' summary judgment motions on March 8, 2002, before the Honorable Wilkie D. Ferguson. (DE ## 173, 227).

On September 30, 2002, Judge Ferguson entered an Order on Motions for Summary Judgment, granting summary judgment as to Defendants Jones and Jenne, granting summary judgment as to Defendant Taylor on the malicious prosecution claim, and denying summary judgment as to Defendant Taylor on the false arrest claim, finding that there were material factual disputes as to whether Taylor had even arguable probable cause to arrest Overman. (DE # 203). On October 15, 2002, Plaintiff moved for entry of final judgment on the claims and parties that had been dismissed pursuant to Federal Rule of Civil Procedure 54(b). (DE # 204). On October 21, 2002, Judge Ferguson entered Final Summary Judgments as to Defendants Jenne and Jones and Partial Summary Judgment as to Defendant Taylor on the malicious prosecution claim. (DE # 208, 209, 210).

On October 25, 2002, Defendant Taylor filed an interlocutory appeal of the denial of qualified immunity in the Eleventh Circuit. On October 28, 2002, Plaintiff' filed a cross-appeal of the summary judgments entered against Defendant Jones and Jenne and of the partial summary

judgment entered against Taylor. (DE # 212). The Eleventh Circuit issued a per curiam opinion on August 14, 2003, finding that the district court had improperly based its denial of Defendant Taylor's entitlement to qualified immunity, at least in part, on Taylor's motive and intent "in contravention of the principles of qualified immunity." *Overman v. Broward Sheriff's Office*, No. 02-15791, slip op. at 1 (11th Cir. Aug. 14, 2003) (DE # 254). The Eleventh Circuit therefore vacated Judge Ferguson's denial of qualified immunity on the false arrest claim and remanded the question of whether Taylor had at least arguable probable cause for an arrest to this Court, "with instructions to reevaluate Taylor's claim under the two-part framework articulated in *Saucier* [*v. Katz*, 533 U.S. 194 (2001)]." *Id.* at 4. The Eleventh Circuit also dismissed Overman's cross-appeal on the finding that it "lack[ed] jurisdiction to review the district court's order granting summary judgment in favor of Jones and Jenne on qualified immunity grounds because Overman still has some claims remaining against Taylor individually." *Id.* at 5.

On September 5, 2003, this case was reassigned to the undersigned who held a status conference and ordered, with approval of the parties, supplemental briefing on the limited issue remanded to this Court. Defendant Taylor filed his Renewed Motion for Summary Judgment on September 19, 2003. (DE # 250). On that same day, Plaintiff filed Motions for Reconsideration of the District Court's September 30, 2002 Order as to Defendants Jones and Taylor, and as to Defendant Jenne (DE # 252, 253), and a Motion to Set Aside Judgments Entered on October 21, 2002, with Respect to Defendants Taylor, Jones and Jenne. (DE ## 251). These four motions are now before the Court, and each will be addressed below in turn.

Appendix B

Analysis

I. Defendant Taylor's Renewed Motion for Summary Judgment

A. *Factual Background*[1]

On September 17, 1997, at about 2:00 a.m., Plaintiff Edward Overman, who was at that time the Chief of the Oakland Park Police Department, was arrested by BSO Deputy Andrew Taylor for driving under the influence ("DUI"). Taylor subsequently completed a probable cause affidavit detailing the grounds upon which he had concluded there was probable cause to believe Overman was impaired while operating a motor vehicle. Further evidence concerning whether probable cause existed has been developed in court documents and through discovery and will be summarized below. The following factual summary is based on both Defendant Taylor's Renewed Summary Judgment Motion and Reply, Plaintiff's Response to Defendant's Motion, and an independent review of the record.

Taylor, a member of the BSO's DUI Task Force, had initiated surveillance of Overman on September 17, 1997, on a tip from William Washington, a former Oakland Park Police Department employee whose employment had been

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1. Because Judge Ferguson's Order on Motions for Summary Judgment, filed September 30, 2002, sets forth the factual background of this case necessary to decide all of the issues before him, the Court incorporates those factual findings by reference and will limit the factual recitation here to those necessary to decide the issue remanded to this Court by the Eleventh Circuit.

terminated by Overman due to allegations of misconduct. Washington, who had been informed by another member of the Oakland Park Police Department that Overman was at the Cheers Bar and Grill, claims to have witnessed Overman consume two to four alcoholic drinks. Washington contacted the BSO dispatcher and left a message with Taylor, who called Washington on his cellular phone. Washington told Taylor that Overman was drunk and was about to drive from the bar. Upon meeting outside of Cheers about fifteen to twenty minutes later, Washington told Taylor that, by that time, he had observed Overman consume four to six drinks.[2] Taylor waited for 30 to 40 minutes outside the bar and followed Overman's car when he observed it leaving the parking lot. After following him for about three miles, Taylor discontinued following Overman after seeing no signs of impairment and observing no traffic infractions. Taylor then called Washington to him inform him of this, but Washington apparently stated that he was going to call the BSO because Overman was going to kill someone.[3]

Taylor subsequently turned around, caught up with Overman, and began to follow him again. Thereafter, Taylor states that he saw Overman's vehicle weave out of his lane, into the next lane, and back into his lane again.[4] Taylor then

2. There is some dispute in the record as to how many total drinks Washington told Taylor he had observed Overman consume.

3. In fact, although Taylor had no knowledge of this, Washington did call BSO 911 and reported Overman's driving pattern and that he was impaired.

4. There is no video recording showing this alleged traffic infraction, and did Taylor issue a citation for it.

turned on his onboard video camera[5] and observed Overman stop beyond the white stop bar at a traffic light at University Drive and then make a right turn and immediately cross several lanes to the far left lane. Overman admitted in his deposition that he stopped past the white stop bar at that light, that he went into the left lane without first straightening out in the right lane, and that he did not use his left turn signal to indicate he was changing lanes. Taylor then pulled Overman over for violating two Florida Motor Vehicle Statutes due to these actions and issued two traffic citations.[6]

Plaintiff contends that his experts, after review of the videotape recorded on Taylor's onboard camera, concluded that Overman did not commit any traffic infractions. However, statements from their affidavits indicate otherwise. Plaintiffs expert Kenneth Harms admitted that "the stop that I saw [in the video] occurred partially over, as I recall, and to the west of the stop bar itself. There was then a subsequent turn to the right, and Overman was in the right lane for a very brief moment in time. And he then moved across the

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5. Although Plaintiff alleges that Taylor had previously activated his video camera during the initial three-mile surveillance of Overman and that he erased this footage, there is no evidence in the record that this occurred and, even if it had, it would create no material dispute given Taylor's concession that he observed no signs of impairment or traffic infractions until after he had turned around and caught back up with Overman.

6. Florida Statutes § 216.075(3)(a)(1) states that vehicles must stop before the white line at intersections. Florida Statutes § 316.151(1) states that right turns must be made "as close as practicable to the right-hand curb or edge of the roadway."

center lane and into the left thru lane."[7] Plaintiff's other expert, Steven Liebowitz, stated that "[y]ou're supposed to stop before the white bar" and that stopping after that bar "is, yes, absolutely a technical traffic infraction," merely noting that "I distinguish between what a reasonable prudent officer would make a stop for."[8]

Upon stopping him, Taylor asked Overman if he suffered any physical infirmities or was on any medication. Overman responded in the negative to both questions. Taylor also asked Overman whether he had consumed any alcohol, to which Overman admitted he had consumed "a couple of drinks," stating later that he had consumed three beers. Taylor detected the odor of alcohol on Overman's breath, observed that his

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7. Harms stated that he would discourage officers from stopping for these types of infractions and that he would not use a stop for this type of violation as a pretext for checking to see if a driver was under the influence. However, he does not state that the stop was illegal, stating, instead, that he would only stop drivers for this type of violation in order to give them a warning. Further, he noted that if he had stopped someone on that basis and then observed sufficient indications that the driver might be impaired, he would have then administered roadside sobriety tests.

8. Even when taken in the light most favorable to the Plaintiff, Overman's experts' dispute over whether Overman actually violated the Florida Statutes that Taylor citing him for violating, this factual dispute is immaterial because, as discussed below, based on the undisputed statements of Overman and his experts, the Court concludes that a reasonable officer could have determined that Overman's actions constituted traffic infractions for which a stop was authorized, even if, in fact, Overman did not commit the infractions.

eyes were bloodshot, and noted that his face appeared flushed. Taylor had been trained that these conditions could be physical signs of impairment due to alcohol consumption. Overman does not dispute that the odor of an alcoholic beverage was coming from his mouth. There are indications that Overman's eyes may have been red because he had been awake for twenty hours and that his face was sunburned, rather than flushed.

Overman voluntarily consented to perform roadside sobriety tests: the horizontal gaze nystagmus test, the standing balance or standing count test, the walk-and-turn test, and the finger-to-nose test. Although Plaintiff's expert disputes that all of these tests were administered correctly, Taylor (1) noted a lack of smooth pursuit and nystagmus at maximum deviation during the horizontal gaze nystagmus, (2) recorded that Overman had a slight sway and estimated thirty seconds when only seventeen had passed on the Rhomberg balance test, (3) indicated that Overman lost his balance during instructions, stepped off to the side, and left gaps of one to two inches several times on the walk-and-turn test, and (4) reported that Overman swayed, lost his balance twice, dropped his foot, and raised his arms twice on the one-leg stand. Overman admitted that he did not do the balancing tests well, but claims he would never be able to do these tests well, likely due to hearing and inner ear problems. However, he also admitted that he knew of these hearing problems before his arrest by Taylor and that he did not tell Taylor about these medical problems. Taylor stated that he had specifically asked Overman if he had any medical infirmities prior to conducting the roadside sobriety tests.

Overman further admitted that he stepped off to the side while attempting to walk in a straight line on the walk-and-turn test.[9]

Subsequent to these roadside tests, Taylor stated that he felt he had probable cause to establish impairment due to alcohol consumption and arrested Overman for driving under the influence in violation of Florida Statutes § 316.193. He transported Overman back to the BSO, where Overman voluntarily submitted to two intoxilyzer or breath tests conducted by Community Service Aid Franca DiCienzo. The first test indicated a blood alcohol content of .043 grams of alcohol per 210 liters of breath and the second indicated .039 g/210L. In Florida, a breath test of less than .05 g/210L creates a presumption that the person was not impaired, no presumption can be drawn from a breath test of between .05 and .08, and a breath test of .08 or above creates a presumption of impairment. Overman's breath test was conducted about an hour and ten minutes after he was stopped

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9. Overman and his expert, Liebowitz, allege that Taylor deliberately misinstructed Overman on at least two of the tests and conducted the horizontal nystagmus test incorrectly. Despite the dispute over whether all of these tests were administered entirely correctly, the Court finds that there is no material dispute in this regard because, as discussed below, Overman's admissions regarding his performance on these tests are sufficient to support that Taylor had arguable probable cause for an arrest. Liebowitz also claims that Taylor should not have used one of the tests that he administered — the finger-to-nose test — because it is not validated by the State of Florida. Liebowitz then admits that his department does use that test and "imposes it upon" him. Thus, Plaintiff would be hard pressed to demonstrate that it was clearly established that use of this test is improper.

by Taylor.[10] DiCienzo also indicated in his report that Overman's breath smelled of alcohol, that his eyes were red, that his face was sunburned, that his speech was fair, and that his demeanor was "cooperative-polite." After taking the breath tests, Overman voluntarily provided a urine sample. The urine sample analysis, which was completed on August 21, 1997, revealed that Overman had fully absorbed the equivalent of three twelve-ounce, four percent proof beers.

At the BSO, Taylor completed a probable cause affidavit, which was subsequently filed with the court and provided to the State Attorney's Office (SAO). The affidavit did not include any reference to Washington, nor did it indicate that Taylor had been acting on a tip of any kind when he stopped Overman. However, in the affidavit, Taylor did set forth many of the other facts noted above, indicating that he saw the defendant weave in and out of his lane, not come to a complete stop at University Road, and then make a wide right turn. The affidavit further recorded Taylor's above-noted observations regarding Overman's appearance and physical signs of possible impairment, reported Overman's verbal

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10. Assistant State Attorney Lee Cohen indicated that his office would prosecute someone with a low breath test for DUI "[i]f there's other evidence of impairment or if there are other substances impairing them." He further noted that the breath tests were taken "an hour and one minute or so after the incident. So his breath alcohol level at the time of driving certainly could have been higher. . . . And people can very easily be impaired with breath alcohol levels of .05. . . . So if he's impaired, whether it's due to his age, his physical condition, or a combination of everything, if he's impaired and he's impaired at an .05, you know, there could be a case to charge." Plaintiff's expert, Liebowitz, admits that charges can be filed for DUI on a breath test indicating less than .05 g/210L.

statements regarding having no illnesses, injuries or medication and that he had consumed three drinks, and summarized Overman's performance on the roadside sobriety tests. Assistant State Attorney ("ASA") Lee Cohen noted in his deposition that "there was nothing that we found that wasn't true in the probable cause affidavit." The probable cause affidavit was taken with Overman to the main jail, where Overman was booked and later released.

It is undisputed that Taylor did not reveal everything that might have been relevant to this case, either in the probable cause affidavit or during a meeting with the SAO on August 18, 1997.[11] He did not disclose that he had initially received a tip from Washington, that he had waited outside of Cheers for nearly forty minutes, and that he had followed Overman for three miles without observing traffic infractions or signs of impairment. Taylor claims he did not identify Taylor as a witness in the probable cause affidavit because he did not believe Washington was a witness. In response to questions asked during the meeting with the SAO, Taylor falsely stated that he did not know that Overman was the Chief of the Oakland Park Police Department until after the arrest, denied any knowledge of Washington, and failed to disclose Washington's involvement in the arrest, stating instead that Taylor had come upon Overman innocently while patrolling.

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11. In fact, much of Plaintiff's statement of facts in response to this motion for summary judgment discusses items that were omitted from the probable cause affidavit and not related by Taylor to the SAO. Further, his argument against summary judgment relies heavily on the absence of this "exculpatory" information, alleging that this provides a basis for finding there are material factual disputes as to whether arguable probable cause for the arrest existed.

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On August 18, 1997, subsequent to the meeting with the SAO, Taylor did reveal Washington's involvement and other circumstances involving Overman's arrest to his supervisor, Jones. These additional facts were related to the SAO on August 20, 1997, which decided to wait until some additional witnesses had been interviewed before making a filing decision on the case.[12] On August 27, 1997, the SAO decided not to prosecute and filed a "no information" dismissing the case. Taylor, who had been put on restricted administrative assignment on August 18, 1997, was subsequently discharged from the BSO. However, ASA Cohen noted in his memorandum concerning filing a "no information" and in his subsequent testimony that Taylor had probable cause for the arrest and that his actions with regard to Overman did not constitute criminal conduct.

B. *Summary Judgment Standard*

Summary judgment is appropriate if the pleadings, depositions, and affidavits show that there is no genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). An issue is "material" if it is a legal element of the claim under applicable substantive law which might affect the outcome of the case.

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12. While Plaintiffs allegation that "no Defendant informed prosecutors of Taylor's lies and omissions" may technically be true, prosecutors were advised, within three days of the arrest, of all the background facts, including Washington's involvement and Taylor's admissions, by two Office of Professional Compliance investigators from the BSO. *See* September 20, 2002 Order on Motions for Summary Judgment at 6.

Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986); *Allen v. Tyson Foods*, 121 F.3d 642, 646 (11th Cir. 1997). An issue is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *Allen*, 121 F.3d at 646. On a motion for summary judgment, the Court must view all the evidence and all factual inferences drawn therefrom in the light most favorable to the non-moving party, and determine whether that evidence could reasonably sustain a jury verdict. *Celotex*, 477 U.S. at 322-23; *Allen*, 121 F.3d at 646.

While the burden on the movant is great, the opposing party has a duty to present affirmative evidence in order to defeat a properly supported motion for summary judgment. *Anderson*, 477 U.S. at 252. A mere "scintilla" of evidence in favor of the non-moving party, or evidence that is merely colorable or not significantly probative is not enough. *Id.*; *see also Mayfield v. Patterson Pump Co.*, 101 F.3d 1371, 1376 (11th Cir. 1996) (conclusory allegations and conjecture cannot be the basis for denying summary judgment).

C. *Analysis*

As noted, the Eleventh Circuit instructed this court to reconsider on remand whether Defendant Taylor is entitled to a defense of qualified immunity under the Supreme Court's test enunciated in *Saucier v. Katz*, 533 U.S. 194 (2001). That opinion sets out a two-step test in which a court must first determine whether the facts, taken in the light most favorable to the party asserting the injury, shows that the official's conduct violated a constitutional right. *Id.* at 201. If so, then the court must determine whether that

constitutional right was "clearly established" at the time of the alleged violation. *Id.* For a right to be clearly established for qualified immunity purposes, it must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citation omitted). This "reasonable officer" standard is an entirely objective standard, and the subjective intention of the officer is irrelevant when determining whether that officer is entitled to a defense of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Lee v. Ferraro*, 284 F.3d 1188, 1193 n.2 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 2002 WL 1049396 (11th Cir., May 13, 2002) (No. 00-16054); *Skruch v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002). Thus, qualified immunity affords "complete protection for government officials sued in their individual capacities as long as 'their conduct violates no clearly established statutory or constitutional right of which a reasonable person would have known.'" *Thomas v. Roberts*, 284 F.3d 1188. 1193-94 (11th Cir. 2002) (quoting *Harlow*, 457 U.S. at 818), *reinstated by* 323 F.3d 950 (11th Cir. 2003). This defense protects from suit "all but the plainly incompetent or one who is knowingly violating the federal law." *Ferraro*, 284 F.3d at 994 (quoting *Willingham v. Loughnan*, 261 F.3d 1178, 1187 (11th Cir. 2001)). Qualified immunity is not lost simply because another officer might have done a better job under the circumstances. *See Roy v. Inhabitants of City of Lewiston*, 42 F.3d 691, 695 (1st Cir. 1994).

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The specific constitutional right at issue here is the right to be free from a false arrest. A defendant has an absolute defense to a § 1983 false arrest allegation if that defendant can demonstrate that he or she had actual probable cause for the arrest. *See Marx v. Gumbinner*, 905 F.2d 1503, 1505-06 (11th Cir. 1990) ("A warrantless arrest without probable cause violates the Constitution and forms the basis for a section 1983 claim. The existence of probable cause, however, is an absolute bar to a section 1983 action for false arrest.") (internal citations omitted). "Probable cause [to arrest] exists where 'the facts and circumstances with [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949) (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925)).

If the facts do not support the existence of actual probable cause, an officer is nonetheless entitled to the defense of qualified immunity if the officer had "arguable probable cause" to make the arrest. Arguable probable cause is a more lenient standard than actual probable cause. *See Knight v. Jacobson*, 300 F.3d 1272, 1274 (11th Cir. 2002) (citing *Jones v. Cannon*, 174 F.3d 1271, 1283 n. 3 (11th Cir. 1999)); *see also Redd v. City of Enterprise*, 140 F.3d 1378, 1382 (11th Cir. 1998); *Montoute v. Carr*, 114 F.3d 181, 184 (11th Cir. 1997) ("In order to be entitled to qualified immunity from a Fourth Amendment claim, an officer need not have actual probable cause but only 'arguable probable cause,' i.e., the facts and circumstances must be such that the officer reasonably could have believed that probable cause existed").

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Arguable probable cause is distinct from probable cause in fact, *Post v. City of fort Lauderdale*, 7 F.3d 1552, 1558 (11th Cir. 1993), *modified by* 14 F.3d 583 (11th Cir. 1994), and does not require overwhelmingly convincing evidence, only "reasonably trustworthy information." *Marx*, 905 F.2d at 1506. "Arguable probable cause does not require an arresting officer to prove every element of a crime or obtain a confession before making an arrest, which would negate the concept of probable cause and turn arresting officers into prosecutors." *Scarbrough v. Myles*, 245 F.3d 1299, 1302-03 (11th Cir. 2001) (footnote omitted). "'Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity.'" *Wood v. Kesler*, 323 F.3d 872, 878 (11th Cir.) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)), *cert. denied*, 124 S. Ct. 298 (2003). Thus, this standard "gives ample room for mistaken judgments." *Gold v. City of Miami*, 121 F.3d 1442, 1446 (11th Cir. 2001). "This accommodation for reasonable error exists because 'officials should not err always on the side of caution' because they fear being sued." *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)).[13]

In this case, the Eleventh Circuit found that Judge Ferguson's denial of summary judgment was based, at least in part, on an evaluation of the subjective intent of Taylor,

13. Plaintiff cites numerous cases in opposition to this motion for summary judgment from the First, Eighth, Tenth, and D.C. Circuits noting the effect omission of facts has on a finding of probable cause, the contours of the objectively reasonable officer test in those circuits, and the requirements for an investigative stop. Because the law of qualified immunity varies from circuit to circuit, those cases can neither be considered binding nor particularly persuasive in analyzing this case.

so it remanded the case with explicit instructions for this Court to reconsider whether Taylor is entitled to qualified immunity if Taylor's subjective intent is not considered. Thus, the only question for this Court to decide is whether, based on undisputed, material facts and drawing all inferences in the light most favorable to the Plaintiff as the non-moving party, Taylor had either actual probable cause to arrest Overman on September 17, 1997, giving him a complete defense, or arguable probable cause, entitling him to a defense of qualified immunity.

The question of whether there are material factual disputes that would preclude a finding of actual probable cause is a very close one, since Plaintiff has raised some factual questions as to whether the information from Washington was sufficiently reliable, whether Overman actually committed the minor traffic infractions for which he was cited, whether Taylor properly administered the roadside sobriety tests, and whether Overman displayed sufficient overt signs of impairment. However, the Court need not resolve this difficult question, because the record contains no genuine issue of material fact that would preclude a ruling on whether Taylor had *arguable* probable cause. Thus, disregarding the question of Taylor's subjective intentions for arresting Overman, the Court finds that Taylor did have arguable probable cause to make the arrest and, thus, is entitled to a defense of qualified immunity.

Although Plaintiff Overman claims there are material factual disputes which preclude summary judgment even as to arguable probable cause, the Court finds that Defendant has demonstrated sufficient undisputed facts upon which this

court can conclude that an officer could reasonably have believed he had probable cause sufficient to arrest Overman. Both of the traffic infractions for which Plaintiff was stopped, in addition to the driving under the influence charge, are violations of Chapter 316 of the Florida Statutes, and full custodial arrest is authorized for any of these violations. *See* Fla. Stat. § 901.15 ("A law enforcement officer may arrest a person without a warrant when: . . . [a] violation of Chapter 316 has been committed in the presence of the officer. . . ."); *see also City of Lago Vista v. Atwater*, 532 U.S. 318 (2001) (allowing arrest for any violation of criminal code, even where incarceration is not a possible penalty for that offense). Plaintiff argues, however, that Taylor' initial stop of Overman for the traffic infractions with which he was charged was illegal because Overman did not actually commit those traffic infractions.[14]

Even if Plaintiff s contentions in this regard are true, it is clear Taylor could reasonably have believed he had probable cause to stop Overman for what could fairly have been seen as a traffic infraction. *See Hudson v. Hall*, 231 F.3d 1289, 1295 (11th Cir. 2000) ("That a police officer may conduct a traffic stop where the officer has probable cause to believe that a traffic violation has occurred is

14. Overman claims that a videotape of the stop at the traffic light shows that he did stop at the light before the white cross-bar, and then pulled forward and stopped again beyond the white cross-bar so that he could make the right turn on red. One of his experts, Liebowitz, also argues that his immediate crossing of three lanes of traffic after the turn without straightening up in the right lane was legal because the statute allows for such a maneuver as long as it is "practicable" for him to do so.

well-settled"); *see also Whren v. United States*, 517 U.S. 806, 813 (1996) (holding that a determination of the constitutional reasonableness of a traffic stop must be based on an objective test and does not "depend on the actual motivations of the individual officers involved").[15] Both of Plaintiffs experts admit that pulling beyond the white stop bar is a technical traffic violation for which a stop can be made. Both also concede that the type of lane change Overman made could be illegal under at least some circumstances. Therefore, it is at least arguable that Taylor had probable cause to stop Overman for at least one traffic infraction. Taylor's stop was thus legal, since Taylor did not "clearly lack[] probable cause to believe that" Overman had "violated the traffic laws" of Florida. *See id.*[16] Further, it is undisputed, and in fact admitted

15. As *Whren* makes clear, a traffic stop does not become a constitutional violation just because it is pretextual, since the subjective intent of the officer in making the stop cannot be considered. 517 U.S. at 813. Thus, Plaintiff's argument that the stop was pretextual is irrelevant, as long as it was objectively reasonable for Taylor to initiate the stop.

16. Plaintiff's argument relies heavily on the opinions of his two experts, both of whom have suggested that they would not have stopped Overman for these violations even if they were technical violations of traffic laws. They further represent that it was imprudent and unreasonable for Taylor to do so. However, even if they would not have stopped Overman, this Court finds that a reasonable officer could have. In fact, one expert, Harms did not even say he would not have stopped the driver; rather, he indicated that he might have stopped him, but only to give him a warning, not to write a citation. This admission further demonstrates that the initial stop was not improper. Plaintiff's other expert, Liebowitz, while acknowledging

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by Overman in his deposition, that Overman did not use his left-turn signal as he made his lane change across three lanes. One of Plaintiff's experts, Harms, explicitly acknowledges that this is a violation of the Florida Statutes and that it is "used as a pretext to stop someone and look in their car or to question them or to see if they're DUI." Even though Taylor did not pull Overman over for that violation, it would have provided sufficient grounds for the stop, even if not announced. In *Lee v. Ferraro*, the Eleventh Circuit found that the officer's arrest of an individual was warranted, and granted qualified immunity even though the officer did not cite the noise ordinance which permitted the arrest either orally at the time of arrest or in his arrest report. 284 F.3d 1188, 1195 (11th Cir. 2002), *reh'g and reh'g en banc denied*, 2002 WL 1049396 (11th Cir., May 13, 2002) (No. 00-16054). "Quite simply, '[t]he validity of an arrest does not turn on the offense announced by the officer at the time of the arrest.'" *Id.* at 1196 (quoting *Bailey v. Bd. of County Comm'rs of Alachua County*, 956 F.2d 1112, 1119 n.4 (11th Cir. 1995)).

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that pulling past the white stop bar is a "technical violation" of state law, explains "Can you write a ticket for it? No . . . That's where you have to use common sense and consistency in enforcing the law." Even accepting this expert's opinion that it was improper for Taylor to stop Overman because the violation was too minor, Plaintiff has not cited any case law indicating that it was *clearly established* that an officer was not permitted to stop a driver for such a minor offense. Quite to the contrary, it was established then, and is even more well established now, that an officer can stop and arrest an individual for a violation of the criminal code or a criminal traffic statute, "no matter how minor the offense." *Ferraro*, 284 F.3d at 1196; *see also Whren*, 517 U.S. at 818-19. Thus, Defendant Taylor would still be entitled to qualified immunity on the second part of the *Saucier* test.

Moreover, an improper stop does not negate an officer's entitlement to qualified immunity if the officer subsequently arrests the individual after developing probable cause to arrest him or her for a different offense. "Indeed, '[w]hen an officer makes an arrest, which is properly supported by probable cause to arrest for a certain offense, neither his subjective reliance on an offense for which no probable cause exists nor his verbal announcement of the wrong offense vitiates the arrest." *Id.* (quoting *United States v. Saunders*, 476 F.2d 5, 7 (5th Cir. 1973)). Once Taylor had stopped Overman, he certainly developed arguable probable cause to arrest Overman for driving under the influence. It is undisputed that Taylor had received information from a former law enforcement officer that Overman had consumed somewhere between three and nine drinks. Although Overman claims Washington's information should not have been believed because he could not be considered a reliable source after having been fired by Overman, it was not unreasonable for Taylor to have given some credit to that information, especially given that he subsequently saw Overman leave the bar in his car after having been inside for at least forty minutes. When he stopped Overman, it was not unreasonable for Taylor to believe he might be impaired when he smelled alcohol on Overman's breath, observed that he appeared flushed,[17] and heard from Overman himself that he had

17. Although there is some evidence that Overman's face was not flushed, but rather was red from being sunburned, it was not unreasonable for Taylor to conclude his face may have been flushed from alcohol consumption given that it was after dark at 2:00 a.m. when he stopped Overman and given that he had reliable information, including Overman's own admission to him, that Overman had consumed some alcohol within the last hour.

consumed "a couple" or three alcoholic beverages. After Taylor conducted the roadside sobriety tests, it was not unreasonable for him to believe that Overman was impaired when he was unable to balance on one foot, when he fell off to one side in the walk-and-turn test, when he wrongly estimated the time he was standing on one foot, and when Taylor observed that Overman did not show "smooth pursuit" on the gaze nystagmus test. This is especially true since Overman, a law enforcement officer who was familiar with conducting these tests, admitted to having done poorly on the balancing test, to having fallen off in the walk-and-turn, to failing to properly estimate thirty seconds, and to not disclosing to Taylor a medical condition that may have been the true cause of some of his problems with those tests. Further, despite the fact that Overman's breath test was in the level that creates a presumption of no impairment, it was not unreasonable for Taylor to believe there was still probable cause for DUI where it is undisputed that a driver with under a .05 g/210L reading can be impaired, where Taylor had observed other signs of impairment, where over an hour had passed since the traffic stop, and where there was a possibility of impairment by substances other than alcohol which could only be confirmed through analysis of the urine sample. Especially when taken in view of the totality of the circumstances presented here, these various signs and symptoms of alcohol impairment are sufficient to establish arguable probable cause since a reasonable police officer faced with the same circumstances could have believed that there was probable cause to conclude that Overman was impaired.

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Plaintiff nonetheless argues that this Court cannot find that arguable probable cause existed because Taylor "deliberately and in reckless disregard of the truth falsified his probable cause affidavit, both by statements which he knew to be untrue and by omitting facts material to a finding of probable cause." Overman cites Eleventh Circuit law supporting that intentional misstatements in an affidavit will not shield an officer from liability "if such false statements were necessary to the probable cause." *See Jones v. Cannon*, 174 F.3d 1271, 1285 (11th Cir. 1999). However, he has not pointed to any evidence supporting that any statement in the probable cause affidavit was false, much less intentionally false. ASA Cohen noted that his office did not find any statement in the affidavit to be untrue. Further, despite any omissions or possible misstatements, the statements contained in the probable cause affidavit which are indisputably true are sufficient to establish arguable probable cause for the arrest.

Moreover, although Overman claims his argument in this regard does not rely on Taylor's subjective intent and that he is "not concerned with Taylor's motives or reasons," his entire argument against summary judgment is, in fact, tinged by the suggestion that Taylor was assisting Washington with carrying out a vendetta. Both case law and the explicit direction of the Eleventh Circuit in this case clearly instruct this Court that it must not consider subjective intent. *See, e.g., Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990); *Overman v. Broward Sheriff's Office*, No. 02-15791, slip op. at 1 (11th Cir. Aug. 14, 2003) (DE # 254). Sufficient facts to establish arguable probable cause are present if viewed through the purely objective lens that this Court must

use. Only when subjective intentions are injected into the analysis do certain undisputed facts begin to look suspicious. Taylor's reliance on Washington's tip only appears unreasonable when coupled with the fact that Washington had recently been fired by Overman, leading to the inference that Taylor was ignoring his duties to try to help Washington exact revenge. Taylor's following Overman for several miles and pulling him over for minor traffic infractions only seems unreasonable and vindictive if the Court accepts that he was purposely targeting Overman for any purpose other than the protection of public safety. Determining whether Taylor intentionally conducted the roadside sobriety tests in the wrong manner, therefore making it unreasonable for him to rely on the results in assessing whether there was arguable probable cause, requires an inference that he was out to get Overman and wanted to cause him to fail the tests. Plaintiff places significant emphasis on the fact that Taylor did not immediately disclose certain facts to the prosecutor and his supervisors, even though both felt there was still probable cause for the arrest after they learned of the additional information. Whether it was unreasonable for Taylor to not disclose this information despite the fact that it was unnecessary to establish probable cause requires an inference that he thought he had something to hide. Because all of these inferences which could raise a question of whether there was even arguable probable cause require consideration of Taylor's subjective intent, they cannot form the basis for a denial of qualified immunity under Eleventh Circuit precedent. Thus, for the foregoing reasons, the Court determines that Taylor did have arguable probable cause for this arrest, and grants Defendant Taylor's Renewed Motion for Summary Judgment on the ground that Taylor is entitled to qualified immunity.

Appendix B

II. Plaintiff's Motion to Set Aside Judgments Entered October 21, 2002

On September 19, 2003, Overman filed a Motion to Set Aside Judgments Entered October 21, 2002, with Respect to Defendants Taylor, Jones, and Jenne (DE # 253) on the ground that Judge Ferguson did not certify the judgments dismissing Jones and Jenne and dismissing one count against Taylor as required by Rule 54(b). In a case involving multiple parties or multiple claims or both, a district court judge can enter final judgment

> as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or *other form of decision, however designated*, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed. R. Civ. Pro. 54(b) (emphasis added). In this case, the Court entered Final Summary Judgments as to Defendant Kenneth C. Jenne, II, and Defendant Frederick Jones, and Partial Summary Judgment as to Andrew Taylor on Count II for malicious prosecution on October 21, 2002. Since fewer

than all the claims were terminated by the Court's Order on Motions for Summary Judgment — specifically, because the false arrest claim against Defendant Taylor was not dismissed — Rule 54(b) required both an express direction for the entry of final judgment and a determination that "there is no just reason for delay." Because the latter determination was not made, the final judgments were defective and should be vacated.

Although this conclusion is warranted on the basis of the express wording of the Rule alone, Overman has also cited authority in support of his contention that final judgment was not properly entered because Judge Ferguson failed to include a Rule 54(b) certification in the final judgments. He has pointed to numerous cases where the Supreme Court and Eleventh Circuit have found that they lacked jurisdiction to hear an appeal where not all counts and parties were dismissed and where the district court's final judgment did not include the required finding that "there is no just reason for delay." *See, e.g., Curtiss-Wright Corp. v. Gen. Elec. Co.*, 446 U.S. 1, 8 (1980) ("Once having found finality, the district court must go on to determine whether there is any just reason for delay."); *Carringer v. Tessmer*, 253 F.3d 1322, 1324 (11th Cir. 2001) ("In order for this court to consider such an appeal, the district court must expressly accomplish what the Rule clearly mandates."); *Hood v. Plantation Gen. Med. Ctr., Ltd.*, 251 F.3d 932, 934 (11th Cir. 2001) (dismissing appeal for lack of jurisdiction because "the Plaintiff received no Rule 54(b) certification from the district court"); *In re Yarn Processing Patent Validity Litig.*, 680 F.2d 1338, 1339 ("In order to enter final judgment under Rule 54(b), the district court must make an express determination that there

is no just reason for delay and must make an express direction for the entry of judgment. Absent these two actions, any order adjudicating fewer than all the claims or the rights and liabilities of fewer than all the parties in a suit is not a final judgment under 28 U.S.C.A. § 1291 (West 1966) regardless of how that order is styled.").

Even more instructive is the fact that, in this case, the Eleventh Circuit denied Plaintiff's cross-appeal of the dismissal of Defendants Jenne and Jones and the partial summary judgment on the malicious prosecution count against Defendant Taylor, stating "we lack jurisdiction to review the district court's order granting summary judgment in favor of Jones and Jenne on qualified immunity grounds because Overman has some claims remaining against Taylor individually." *Overman v. Broward Sheriff's Office*, No. 02-15791, slip op. at 5 (11th Cir. Aug. 14, 2003) (DE # 254). Thus, without expressly stating that the final judgments were inappropriate due to the lack of a Rule 54(b) certification, the Court's ruling effectively found that this was the reason it lacked jurisdiction. As such, this Order vacating those judgments merely gives effect to the holding of the Eleventh Circuit.

Nonetheless, Defendant challenges Plaintiff's Motion to Set Aside Judgments, arguing that the judgments were entered pursuant to Plaintiff's Motion for Entry of Final Judgment and that Overman, the Plaintiff, should not now be permitted to move to vacate a judgment he requested. However, Overman's motion requested a Rule 54(b) certification, and he was denied that request by the entry of a final judgment

that did not include such a certification.[18] Moreover, given this Court's finding on remand which resolves the remaining claim, the Defendant will be in no way prejudiced if the judgments are vacated. A complete final judgment will be entered on this same day which will dismiss the entire action and allow Plaintiff to appeal the final judgment, giving him his first opportunity to appeal Judge Ferguson's prior dismissals since the Eleventh Circuit lacked jurisdiction to hear his prior cross-appeal. For these reasons, the Court grants the Plaintiff's Motion to Set Aside Judgments.

III. Plaintiff's Motions for Reconsideration

Although the remand directive from the Eleventh Circuit limited the issue that this Court was to reconsider to whether Taylor had probable cause or arguable probable cause to arrest Overman, Overman has requested that this Court reconsider Judge Ferguson's dismissal of the malicious prosecution and negligent training and supervision and pattern and practice counts of his Complaint, as well. *See* Motions to Reconsider Order Entered September 30, 2002, as to Defendants Taylor and Jones and as to Defendant Jenne (DE ## 251, 252). Given this Court's ruling on the Motion to Set Aside Judgments, the Court is permitted to reconsider those findings pursuant

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18. Regardless, a party's request for a Rule 54(b) does not bind that party if a court concludes that a Rule 54(b) certification is inappropriate. *See Ebrahimi v. Huntsville Bd. of Educ.*, 114 F.3d 162, 165 (11th Cir. 1997) (noting that "federal courts . . . obligation to police the constitutional and statutory limits on our jurisdiction . . . is not diminished in the slightest by the parties' apparent acquiescence in the district court's determination that Rule 54(b) certification was appropriate").

to Rule 54(b), which states that any order upon which final judgment has not been entered is "subject to revision at any time." Fed. R. Civ. Pro. 54(b). Nonetheless, any decision to reconsider either a final or a non-final order is entirely discretionary with the Court. *See Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 805, 806 (11th Cir. 1993) ("[W]hen reviewing a district court's disposition of a motion for reconsideration after final judgment, we have consistently stated that the decision to grant such relief is committed to the sound discretion of the district judge and will not be overturned on appeal absent an abuse of discretion. . . . We see no reason to apply a different standard when the party seeks reconsideration of a non-final order."); *see also Fla. Assn of Rehab. Facilities, Inc. v. Fla. Dept. of Health & Rehab. Servs.*, 225 F.3d 1208, 1216 (11th Cir. 2000) ("We . . . review the disposition of a motion for reconsideration under an abuse of discretion standard.").

The standard for granting reconsideration is strict and will generally be denied unless the moving party can point to controlling decisions or data that the court overlooked. *Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995). Reconsideration should be granted only where the movant has pointed to factual or legal matters "that might reasonably be expected to alter the conclusion reached by the court"; it should not be granted where the moving party seeks solely to relitigate an issue already decided. *Id.* "Motions for reconsideration are disfavored, and should only be granted where the movant shows newly discovered evidence, clear error, manifest injustice, or an intervening change in controlling law. . . . [A] motion for reconsideration should not be used as a 'vehicle to present authorities available at

the time of the first decision or to reiterate arguments previously made.'" *Compagnoni v. United States*, No. 94-0813-CIV, 1997 WL 416482, at * 1 (S.D. Fla. 1997) (quoting *Z.K. Marine, Inc. v. M/V Archigetis*, 808 F. Supp. 1561, 1563 (S.D. Fla. 1992)), *aff'd* 173 F.3d 1369 (11th Cir. 1999). "It is an improper use of 'the motion to reconsider to ask the Court to rethink what the Court . . . already thought through-rightly or wrongly.'" *Id.* at *2 (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)).

This Court will not act as an appellate court reviewing whether legal errors have been made by another judge who sat at the same level of the federal court system. Although Plaintiff claims numerous legal errors were made by Judge Ferguson and cites cases which allow one district court judge to reconsider the decisions of another district judge in appropriate circumstances, the Court does not find compelling circumstances which would warrant reconsideration of Judge Ferguson's decision in this case. This is especially true given the Court's ruling on Defendant Taylor's qualified immunity for the false arrest claim. Since that ruling disposes of the final claim and party, final judgment on the entire case can now be entered and Overman can raise on appeal any legal errors he believes have been made in this Order and in Judge Ferguson's September 30, 2002 Order.

Moreover, as to the specific grounds for which Overman requests reconsideration, Plaintiff asks this Court to reconsider the dismissal of the failure to train and supervise claims against Defendants Jones and Jenne by raising

essentially the same arguments he raised before Judge Ferguson in response to the original Motions for Summary Judgment. To the extent new arguments or legal authority have been put forward, they should have been raised at that time. As to the dismissal of the malicious prosecution counts against Defendants Taylor and Jones, Plaintiff does rely on authority not previously cited for the proposition that a uniform traffic citation is sufficient to initiate a prosecution for the purposes of a constitutional malicious prosecution claim and that Judge Ferguson's dismissal of those counts on the ground that there was no prosecution was therefore legal error. However, this authority, all of which is from 1999 or earlier, could and should have been raised during the proceedings on the initial Motions for Summary Judgment, and reconsideration on this ground is thus inappropriate.[19]

19. In their summary judgment motions, Defendant Taylor and Defendants Tyrie and Jones raised the argument that a prosecution is initiated only by filing of an information or indictment or an arrest pursuant to a warrant and that, since none of these occurred in this case, there was no prosecution and can be no malicious prosecution. (DE # 84, p. 24; DE # 94, pp. 4-5). Plaintiff did not respond to this argument in its oppositions. (DE # 119; DE # 121). The same Defendants reiterated the argument that there was no prosecution in their replies. (DE # 132, p. 7; DE # 135, p. 2). Defendants then raised the issue again at oral argument, noting that the Plaintiff had failed to respond to that ground for dismissal. (DE # 227, p. 22). Plaintiff did, at that time, orally respond that the prosecution was initiated by issuance of the traffic tickets, but did not cite any of the authority cited in his present Motion for Reconsideration. (DE # 227, pp. 24-25). If these decisions are appealed on the ground that Judge Ferguson's opinion constituted legal error, the Eleventh Circuit may wish to consider whether Overman has waived this argument by not citing these authorities prior to this Motion for Reconsideration. In any event, because this argument should have been fully developed before Judge Ferguson on the original motions, this Court will not consider the argument now.

Further, there is no *controlling* precedent which would compel the opposite conclusion from the one reached by Judge Ferguson with regards to whether an indictment, information, or arrest warrant is required to initiate a prosecution for the purposes of a malicious prosecution claim.[20] Further, at least with respect to Defendant Jones,

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20. Overman claims dismissal of the malicious prosecution claim on the ground that no prosecution had been initiated was clear legal error due to the Florida Supreme Court's holding that "Rule 6.07 authorizes prosecution on the basis of a traffic ticket prepared by a police officer." *Hurley v. State*, 322 So. 2d 506, 507 (Fla. 1975). He argues that, therefore, the prosecution began at the time of issuance of the ticket, and that the "no information" entered by the SAO merely ended the prosecution. However, the Hurley decision and subsequent appellate decisions have only held that issuance of a ticket begins the legal judicial process for some purposes, including double jeopardy and time deadlines. *See, e.g., id.* (uniform traffic citation can be a valid charging document under Florida Constitution); *State v. Williams*, 791 So. 2d 1088, 1092 (Fla. 2001) (citation begins legal process for speedy trial purposes); *Genden v. Fuller*, 648 So. 2d 1183, 1185 (Fla. 1994) (same); *Deel v. State*, 750 So. 2d 112, 113 (Fla. 5th DCA 2000) (citation can be valid charging document that confers jurisdiction); *State v. Wichter*, 737 So. 2d 584, 586 (Fla. 1st DCA 1999) (citation commences prosecution for double jeopardy); *Ivory v. State*, 588 So. 2d 1007, 1009 (Fla. 4th DCA 1991) (citation considered charging document for purposes of statute of limitations). However, it is not clear whether it can constitute commencement of "prosecution" for the purposes of a malicious prosecution claim. In fact, in *Hurley*, in response to the contention that allowing citations to begin the legal process is an unconstitutional delegation of prosecutorial authority to a police official, the Florida Supreme Court rioted that "[a] state attorney or his assistant actually prosecutes these matters on behalf of the state" and "[t]he issuing police official is

(Cont'd)

even if the Court were to reconsider Judge Ferguson's opinion on these counts and come to the opposite conclusion, summary judgment would still be appropriate on the alternative ground found by Judge Ferguson that Jones had not acted with malice, another required element of a § 1983 malicious prosecution claim.

Conclusion

For the reasons stated above, the Court finds that Defendant Taylor is entitled to summary judgment due to qualified immunity, that the judgments entered on October 21, 2002, should be vacated, and that reconsideration of Judge Ferguson's other findings is inappropriate. Accordingly, it is hereby

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(Cont'd)

not the prosecutor." 322 So. 2d at 507. As Judge Ferguson noted, Jones, Tyrie, and Cohen all acknowledged that "it is the exclusive province of the SAO to determine whether to file charges and initiate a prosecution." *See* September 30, 2002 Order on Motions for Summary Judgment at 7, n.12. In his deposition, Overman agreed, on the basis of his many years in law enforcerment, that, once a probable cause affidavit is submitted to the SAO in a DUI case, "the decision [to prosecute] rests solely with the State Attorney's Office." Thus, there is arguably a legal question regarding whether the prosecutor must actively decide to prosecute before a constitutional malicious prosecution claim can be brought, regardless of whether a "prosecution" may be initiated for procedural purposes by a police officer's issuance of a citation. Even were this Court inclined to reconsider and not find that Overman should have raised this argument earlier, this close legal question would be best left to an appellate court.

Appendix B

ORDERED that:

(1) Defendant Taylor's Renewed Motion for Summary Judgment (DE # 250) is GRANTED.

(2) Plaintiff's Motion to Set Aside Judgments (DE # 253) is GRANTED. The judgments entered on October 21, 2002 (DE ## 208, 209, 210) are hereby VACATED. Final judgment as to all parties and counts will be issued this same day.

(3) Plaintiff's Motions for Reconsideration (DE ## 251, 252) are DENIED.

DONE and ORDERED in Chambers, Miami, Florida this 14th day of November, 2003.

s/ Paul C. Huck
Paul. C. Huck
United States District Judge

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED AUGUST 14, 2003

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 02-15791
Non-Argument Calendar

D. C. Docket No. 00-06434-CV-WDF

EDWARD OVERMAN,

Plaintiff-Appellee-Cross-Appellant,

versus

BROWARD SHERIFF'S OFFICE,
Kenneth C. Jenne II, in his official capacity
as the Sheriff of Broward County, et al.,

Defendants-Cross -Appellees,

ANDREW TAYLOR, individually in his capacity
as a former Deputy Sheriff for the
Broward County Sheriffs Office,

Defendant-Appellant-Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Florida

(August 14th, 2003)

Appendix C

Before TJOFLAT, BIRCH, and COX, Circuit Judges.

PER CURIAM:

Andrew Taylor appeals the district court's order denying qualified immunity on Edward Overman's 42 U.S.C. § 1983 claim for false arrest and false imprisonment. On appeal, Taylor contends that he had probable cause or, at the very least, arguable probable cause to arrest Overman, and therefore he is entitled to qualified immunity. Taylor further argues that the district court improperly considered Taylor's motive and intent when it rejected his qualified immunity defenses. Because the district court based its denial of qualified immunity in part upon Taylor's subjective motive or intent, in contravention of the principles of qualified immunity, we vacate the district court's order and remand this action for further proceedings.

We review a district court's grant of summary judgment de novo. *Knight v. Baptist Hosp. of Miami, Inc.*, 330 F.3d 1313, 1316 (11th Cir. 2003). Summary judgment is appropriate only if "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).

When evaluating a qualified immunity defenses, a court must ask two questions: first, whether the facts, taken in the light most favorable to the party asserting the injury, show that the official's conduct violated a constitutional right, and second, if the alleged facts would establish a constitutional violation, whether the constitutional right was clearly established. *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct.

2151, 2156 (2001). As the Supreme Court has observed, "The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S. Ct. at 2156. This "objectively reasonable officer" standard for qualified immunity can be traced back to *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982), in which the Supreme Court explicitly rejected any subjective element in qualified immunity analysis. *Id.* at 818, 102 S. Ct. at 2738. Based on Harlow and its progeny, this circuit has emphasized that the subjective intentions of public officials are not relevant when evaluating qualified immunity. *See, e.g., Lee v. Ferraro*, 284 F.3d 1188, 1193 n.2 (11th Cir. 2002); *Skrtich v. Thornton*, 280 F.3d 1295, 1303 (11th Cir. 2002) ("In determining whether qualified immunity bars a plaintiffs claim, we do not look at the subjective intent of the defendants."); *Koch v. Rugg*, 221 F.3d 1283, 1295 (11th Cir. 2000) ("The subjective intent of government actor defendants plays no part in qualified immunity analysis. . . ."} (citations omitted).

The district court erred when it took into account Overman's allegations regarding Taylor's motivations. It is clear that the district court based its ruling, at least in part, on Taylor's alleged motive. (R.10-229 at 3) ("I think there is a material issue of fact as to whether Taylor had even arguable probable cause in light of all the other evidence in the case, including his motive for following Chief Overman in the first instance."); (R.6-203 at 11-12) ("Overman alleges that Taylor, knowing that he was following a tip from a disgruntled employee, set out to arrest Overman by staking out at Cheers for forty minutes, pursuing him for over three miles without

observing any traffic infractions, intentionally erasing the videotape concerning the pursuit, and intentionally violating department protocol for DUI arrests."). Because the district court improperly considered Taylor's subjective intentions when evaluating his entitlement to qualified immunity, we vacate the district court's order to the extent that it denied Taylor's motion for summary judgment based on qualified immunity and we remand this action to the district court with instructions to reevaluate Taylor's claim under the two-part framework articulated in *Saucier*. In so doing, we should not be understood to express any opinion regarding the existence of probable cause or arguable probable cause, or regarding Taylor's entitlement to qualified immunity.

Overman cross-appeals the district court's grant of qualified immunity to Taylor (on the malicious prosecution claim), Frederick Jones, and Kenneth Jenne, II. Although this court has jurisdiction to consider Taylor's interlocutory appeal of the district court's order denying his motion for summary judgment on qualified immunity grounds, *Thornton v. City of Macon*, 132 F.3d 1395,1397 (11th Cir. 1998), we lack jurisdiction to review the district court's order granting summary judgment in favor of Jones and Jenne on qualified immunity grounds because Overman has some claims remaining against Taylor individually. *See* 28 U.S.C. § 1291; *Hudson v. Hall*, 231 F.3d 1289, 1292 n. 1 (11th Cir. 2000). And to the extent that we may have pendent appellate jurisdiction under *Swint v. Chambers County Comm'n*, 514 U.S. 35, 50-51, 115 S. Ct. 1203, 1212 (1995), to review the grant of summary judgment in favor of Taylor on Overman's malicious prosecution claim, we decline to exercise such

jurisdiction.[1] *Summit Med. Assocs., P.C. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999) (noting that "we may, within our discretion, exercise jurisdiction over otherwise nonappealable orders under the pendent appellate jurisdiction doctrine") (emphasis added). We dismiss Overman's cross-appeal for want of jurisdiction.

VACATED AND REMANDED; CROSS-APPEAL DISMISSED FOR WANT OF JURISDICTION.

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1. It is doubtful that the appealable decision (the denial of qualified immunity on the false arrest and false imprisonment claim) is "inextricably intertwined" with the nonappealable decision (the grant of qualified immunity on the malicious prosecution claim), and it is likewise doubtful that review of the nonappealable decision is "necessary to ensure meaningful review" of the appealable decision. *See Swint*, 514 U.S. at 51, 115 S. Ct. at 1212; *cf. Hudson*, 231 F.3d at 1294 n.4.

APPENDIX D — ORDER ON MOTIONS FOR SUMMARY JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA DATED SEPTEMBER 30, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.00-6434-CIV-FERGUSON

EDWARD OVERMAN,

Plaintiff,

v.

KENNETH C. JENNE, II, in his official capacity as the Sheriff of Broward County, KEVIN M. TYRIE and FREDERICK JONES, individually and in their official capacities as deputy sheriffs for the Broward County Sheriff's Office, ANDREW TAYLOR, individually in his capacity as a former deputy sheriff for the Broward County Sheriffs Office, SUSAN McCAMPBELL, individually as the former Acting Sheriff of Broward County,

Defendants.

ORDER ON MOTIONS FOR SUMMARY JUDGMENT

THIS CAUSE is before the Court on Defendant Andrew Taylor's Motion for Summary Judgment [D.E.84], Defendant Kenneth C. Jenne, II's Motion for Summary Judgment [D.E.93], and Defendant Frederick Jones's Motion for Summary Judgment [D.E.94]. Having considered the

motions, responses, replies and pertinent portions of the record, the Court announced *ore tenus* its rulings at the end of the calendar call heard on July 8, 2002. The Court hereby makes the following findings of fact and conclusions of law as the basis for its *ore tenus* rulings.

FACTUAL BACKGROUND

On August 17, 1997, Edward J. Overman ("Overman"), Chief of the Oakland Park Police Department, was arrested for driving under the influence ("DUI"). The arrest was made by former Broward Sheriff's Office ("BSO") Deputy Andrew Taylor ("Taylor"). At the time of the arrest, Taylor was assigned to BSO's DUI Task Force Unit. William Washington ("Washington"), a former employee of Oakland Park Police Department who had recently been terminated by Overman on allegations of misconduct, received notice from another officer that Overman was at the Cheers Bar and Grill ("Cheers"). Washington proceeded to the Cheers parking lot and observed Overman for twenty to thirty minutes. During this time Washington claims to have witnessed Overman have two (2) to four (4) rounds of drinks. Washington left the parking lot and drove to a shopping plaza where BSO deputy Anthony Pulitano ("Pulitano") was parked in his vehicle completing paperwork. Washington told Pulitano that Overman was at Cheers drinking and asked him to arrest Overman for DUI. Pulitano refused because he knew that Washington had been fired by Overman, he suspected that Washington was on a vendetta and Washington acknowledged to him that his-motives were personal.

Appendix D

Subsequently, Washington called BSO dispatch and gave the dispatch officer a message for Taylor. The dispatch officer forwarded Washington's phone number to Taylor. Taylor, then telephoned Washington. Washington told Taylor that Overman was drunk and was going to drive. Taylor subsequently met Washington approximately fifteen (15) to twenty (20) minutes later near Cheers. Washington told Taylor that he had observed Overman consume six (6) beers. Taylor took up a surveillance position and waited for approximately thirty (30) to forty (40) minutes across the street from Cheers.[1] Taylor did not observe Overman walk out to his vehicle but spotted Overman's vehicle as it left the Cheers parking lot. He followed Overman for approximately one (1) or two (2) miles and saw no indication of alcohol impairment. Taylor called Washington and told him that he had no reason to stop Overman's car and was going to stop following Overman. Washington responded that he would call BSO.[2] Taylor then resumed following Overman.

Taylor eventually stopped Overman for failure to come to a complete stop and failure to turn into the closest lane of

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1. While he was parked across from Cheers, Taylor called Washington to tell him that he could not see the front of the bar and further told him, "I don't know what this person looks like. You'll have to let me know if this car leaves the lot." Depo. of Taylor at 33:14-17.

2. During this time, Washington also called BSO 911 to report Overman's driving pattern and that Overman was impaired. Taylor had no knowledge of the 911 call that was dispatched across the District 7 channel because, as Jones confirmed, Taylor and the DUI Task Force operate on a different radio frequency.

traffic.[3] Taylor advances that when he approached Overman, he noted the odor of alcohol in Overman's breath and that Overman had blood shot eyes and a flush face. The videotape of the stop shows that Overman admitted that he had consumed three (3) beers and that his last drink was approximately one-half hour before the stop.[4] Overman agreed to perform five (5) roadside sobriety exercises. Based on Overman's performance on the tests Taylor concluded that there were several indicators of impairment, including a failure to follow directions, swaying, inaccurate estimation of time and loss of balance.[5] Taylor arrested Overman and he was transported to BSO's DUI breath alcohol testing ("BAT") facility to be administered the Intoxilizer (or breath) test.[6] Franca DiCienzo was the technician who administered

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3. Florida Statutes § 316.075(3)(a)(1) states that vehicles must stop before the white stop line at intersections. Florida Statutes § 316.151(1) states that right turns must be made "as close as practicable to the right-hand curb or edge of the roadway."

4. At deposition, Overman admitted to having consumed $2^{1/2}$ beers.

5. Overman asserts that Taylor intentionally erased the videotape concerning the pursuit and that he intentionally violated the protocol for DUI arrests in order to justify the arrest.

6. Florida Statutes § 316.193 requires that the State prove that the defendant was (1) driving (2) under the influence of an alcoholic beverage or controlled substance when effected to the extent that his normal faculties were impaired or with a breath-alcohol level of 0.08 g/210L or above. Florida Statutes § 316.1934(2)(a) states that if the breath-alcohol level is 0.05 or less, it is presumed that the person was not under the influence of an alcoholic beverage to the extent that his normal facilities were impaired.

the breath test and completed the DUI/Alcohol Influence Report. The report indicated that Overman's breath alcohol readings were .043 and .039.[7] Additionally, the report noted that Overman's breath smelled of alcohol, that his eyes were red, but that his speech was fair and that Overman was cooperative and polite. Overman voluntarily provided a urine sample.[8] Taylor then completed a probable cause affidavit, listing the offenses cited against Overman and containing a statement of facts showing probable cause for the arrest. The probable cause affidavit was taken together with Overman to the main jail where Overman was booked and later released. The probable cause affidavit was forwarded to the SAO.

At the end of his shift on August 17, 1997, Jones met with Taylor and discussed Overman's arrest. Jones also

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7. While at the BAT facility, Taylor once again called Washington to let him know the results of Overman's breath tests.

8. According to Tyrie, in cases where persons are arrested for DUI, and the person records a low breath-alcohol level on the intoxilyzer, urine is taken in order to be examined by the Broward County Medical Examiner's Office to determine whether the person was under the influence of any medications or narcotics that would lead to impairment, or together with alcohol or other substances would lead to impairment. The results of the tests often are not returned for several weeks. The results are submitted to the SAO in order to assist in their determination of whether to initiate a prosecution. The urine analysis ultimately revealed that there was no controlled substance in Overman's system on the date of the arrest. Additionally, the urine analysis demonstrated that at the time of the traffic stop Overman had fully absorbed into his bloodstream the equivalent of three (3), twelve (12) ounce, four percent (4%) proof beers.

reviewed the probable cause affidavit and subsequently reviewed the videotape of the arrest. According to Jones, he did not notice anything out of the ordinary in Taylor's account of the arrest, the probable cause affidavit or the videotape, other than the fact that Overman was the Chief of Police for the City of Oakland Park and his breath alcohol reading was below .05. During his deposition, Jones explained that the probable cause affidavit is the only record made by BSO deputies in DUI arrests. Accordingly, Jones indicated that the probable cause affidavit is required to include all relevant information concerning the arrest.

On August 18, 1997, the day following the arrest, a pre-filing conference was held with the SAO to gather further information, evidence and to identify witnesses before the SAO decided whether to prosecute Overman. During this conference, two specific questions were raised. First, SAO asked Taylor when he had become aware that Overman was Oakland Park's Chief of Police. To this, Taylor responded falsely that he did not become aware that he was the Chief until after he had made the arrest. Second, Taylor was asked about his knowledge of a third party, potentially a disgruntled ex-employee from the City of Oakland Park Police Department, who was involved in setting up Overman. Taylor denied any such knowledge and maintained that he innocently came upon Overman in the normal course of his duties while patrolling.

On the evening of August 18, 1997, Jones questioned Taylor as to why he made the arrest in West Broward when Taylor was usually assigned to patrol the area of Federal Highway (East Broward County). Taylor first told Jones that

he (Jones) did not want to know why he was at that location, but finally disclosed the overall circumstances surrounding Overman's arrest, including Washington's involvement. Jones immediately notified his supervisor, Tyrie, who in turn notified his supervisor, Captain Deborah Berry ("Berry"). Immediately thereafter, Berry notified her supervisor, Major Frank LeBlanc ("LeBlanc"), who ordered that Taylor be immediately placed on restricted administrative assignment. Within a few hours, Tyrie and Berry arrived at Taylor's residence, placed him on restricted administrative assignment, took away his badge, and advised him not to take any actions as a deputy sheriff. BSO's Office of Professional Compliance ("OPC") was immediately notified of the events by LeBlanc and on the following day, August 19,1997, Sergeant Randy Goldberg ("Goldberg") of the OPC commenced an investigation.[9] As part of the investigation Goldberg interviewed Deputy Anthony Lucca and Deputy Curtis Andrews, who were involved in the transportation of Overman to the main jail. The officers consistently recalled that Overman was walking straight and did not exhibit any signs of impairment.

On August 20,1997, Goldberg and Sergeant Charles Tate, both from BSO's OPC met with the SAO, including Assistant State Attorney Lee Cohen ("Cohen"), to advise the SAO of all of the background facts that they had learned regarding

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9. The OPC investigation into Taylor's alleged misconduct concluded on September 4, 1997 and a report was issued charging Taylor with violations of BSO's policies and procedures. Taylor was terminated on September 26, 1997 for misconduct relating to the arrest of Overman and concealment of pertinent information from BSO and the SAO.

Overman's arrest, Washington's involvement, and Taylor's subsequent admissions. After receiving the information, on August 20, 1997, the SAO decided not to make a filing decision on the case until after Overman's urine results were returned and statements were taken from witnesses. The negative toxicology results were reported to the SAO on August 21, 1997.[10] Thereafter, the SAO determined that the investigation would remain open until they had an opportunity to question the witnesses in the case, including other individuals who had been present at Cheers with Overman.[11] Ultimately, on August 27, 1997, the SAO decided not to prosecute Overman and filed an announcement of "no information" thereby dismissing the case.[12]

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10. The Broward County Medical Examiner's Office performed an analysis of Overman's urine sample using a gas, Chromatography.

11. Several individuals, including the bartender who served Overman and other police officers, present at Cheers at the time in question, provided sworn statements indicating that Overman did not appear impaired at the time he left Cheers.

12. In depositions, Jones, Tyrie, and Cohen acknowledged that once a probable cause affidavit has been submitted to the SAO, it is the exclusive province of the SAO to determine whether to file the charges and initiate a prosecution. If the arresting agency learns of new information related to the arrest, the probable cause affidavit cannot be withdrawn; instead, the arresting officer, or agency must forward the information to the SAO to assist them in their determination. Overman admits that once a probable cause affidavit has been referred to the SAO, it is for the SAO to decide whether to prosecute.

Appendix D

Overman's complaint consists of five (5) surviving counts: violation of 42 U.S.C. § 1983 for false arrest and imprisonment against Taylor ("Count I"); violation of 42 U.S.C. § 1983 for malicious prosecution against Taylor ("Count II"); violation of 42 U.S.C. § 1983 for malicious prosecution against Jones ("Count III"); state law claims for negligent training, supervision and hiring against Kenneth Jenne, II, in his official capacity as the Sheriff of Broward County ("Count VI"); and violation of 42 U.S.C. § 1983 for causing a pattern and practice of unjustified, unreasonable and illegal false arrests, detentions or malicious prosecutions against Jenne ("Count VIII").[13] Overman's section 1983 claims are predicated on violation of his constitutional rights under the Fourth and Fourteenth Amendments. The Amended Complaint asserts that Taylor is being sued in his individual capacity; Jones is being sued in his individual and official capacity; and Jenne is being sued in his official capacity.

STANDARD FOR ENTRY OF SUMMARY JUDGMENT

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). A factual dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the non-movant.

13. Count IV against Kevin M. Tyrie and counts V and VII against Susan McCampbell were voluntarily dismissed.

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Similarly, a fact is "material" if it might affect the outcome of the suit under the governing substantive law. *Id.* at 247.

In considering this motion for summary judgment, the Court must examine "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that the defendant should prevail as a matter of law." *Id.* at 243. The movant bears the initial burden of showing the absence of a genuine issue as to any material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In deciding whether the movant has met this burden, the Court must-view the evidence and all factual inferences in the light most favorable to the non-movant. *Miranda v. B&B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1532 (11th Cir. 1992). "If reasonable minds could differ on the inferences arising from undisputed facts, summary judgment should be denied." *Id.* at 1534.

Once the initial burden is met, the non-movant must come forward with specific facts showing that there is a genuine issue for trial that precludes summary judgment. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The evidence presented cannot consist of conclusory allegations, legal conclusions or evidence which would be inadmissible at trial. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991). Likewise, "a mere scintilla of evidence supporting a position will not suffice; there must be enough of a showing that the jury could reasonably find for the [non-movant]." *Anderson*, 477 U.S. at 252. Failure to make a showing sufficient to establish the existence of any essential element of a claim is fatal and requires the entry of summary judgment. *Celotex Corp.*, 477 U.S. at 322-23.

Appendix D

STANDARD FOR QUALIFIED IMMUNITY

All the defendants assert qualified immunity in support of their motions for summary judgment. Determination of qualified immunity is a legal question, the answer dependent on the particular facts of the case. *Sheth v. Webster*, 145 F.3d 1231, 1236 (11th Cir. 1998). The United States Supreme Court holds that "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). The probable cause standard, where a government actor raises the defense of qualified immunity, places the burden on the plaintiff to establish that, "'when the defendant acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful.'" *Gold v. City of Miami*, 121 F.3d 1442, 1445 (11th Cir. 1997) (citation omitted). "Although earlier cases involving 'fundamentally similar' facts can provide especially strong support for a conclusion that the law is clearly established, they are not necessary to" a determination as to whether certain conduct violates established law. *Hope v. Pelzer*, 122 S. Ct. 2508, 2516 (2002) (discussing *United States v. Lanier*, 73 F.3d 1380 (6th Cir. 1996)). In fact, "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Id.*

Appendix D

DISCUSSION

A. Summary Judgment as to Tams

1. False Arrest and Imprisonment (Count I)

It is undisputed that under the Fourth Amendment Overman has a constitutional right to be free from an unlawful arrest. *Albright v. Oliver*, 510 U.S. 266 (1994) (noting that the Framers drafted the Fourth Amendment to address "pretrial deprivations of liberty"). In deciding whether an arresting officer is immune from liability for a warrantless arrest, the issue is not whether that officer possessed probable cause in fact, or actual probable cause, but whether the officer had "arguable" probable cause before making a warrantless arrest. *Von Stein v. Brescher*, 904 F.2d 572, 579 (11th Cir. 1990) (citing *Gorra v. Hanson*, 880 F.2d 95, 97 (8th Cir. 1989) and quoting *Floyd v. Farrell*, 765 F.2d 1, 5 (1st Cir. 1985)).

> Even at the summary judgment stage, not all defendants entitled to protection of the qualified immunity defense will get it. The ones who should be given that protection at the summary judgment stage are those who establish that there is no genuine issue of material fact preventing them from being entitled to qualified immunity. . . . But if the evidence at the summary judgment stage, viewed in the light most favorable to the plaintiff, shows there are facts that are inconsistent with qualified immunity being granted, the case and the qualified immunity issue along with it will proceed to trial.

Johnson v. Breeden, 280 F.3d 1308, 1317 (11th Cir. 2002).

Appendix D

The defense of qualified immunity is a question of law to be resolved by the Court; however, there are factual issues in this case that must first be resolved by the fact finder. *Wilson v. Lawrence County*, 260 F.3d 946 (8th Cir. 2001) (denying request for summary judgment based on qualified immunity because fact issues on probable cause for arrest claim precluded summary judgment). *Accord Wald v. City of Margate*, 756 So. 2d 168 (Fla. 4th Dist. Ct. App. 2000) (holding that genuine issue of material fact as to whether driver passed sobriety test precluded summary judgment on issues of probable cause and qualified immunity).

In light of all the evidence, including that which shows that Taylor was part of a plan to arrest before there was probable cause, the Court finds that there is a genuine issue of material fact as to whether Overman violated the traffic law(s) that led to the stop and subsequent arrest. *Compare Lee v. Ferraro*, 284 F.3d 1188 (11th Cir. 2002) (holding that officer had arguable probable cause to effect a full custodial arrest because there was no dispute that a traffic ordinance was violated). This case is factually distinguishable from Lee in which there was no dispute that the officer, based on facts observed before the arrest, effected a lawful arrest. This case is more like Wilson, in which there was a material issue of fact as to whether the officer had "arguable probable cause" to make an arrest. Overman alleges that Taylor, knowing that he was following a tip from a disgruntled employee, set out to arrest Overman by staking out at Cheers for forty minutes, pursuing him for over three miles without observing any traffic infractions, intentionally erasing the videotape concerning the pursuit, and intentionally violating department

protocol for DUI arrests.[14] For these reasons, the facts of this case are not properly decided on a motion for summary judgment and Taylor's motion for summary judgment is denied as to Count I.

2. Malicious Prosecution (Count II)

A section 1983 claim for malicious prosecution "can be a shorthand way of describing a kind of legitimate section 1983 claim; the kind of claim where the plaintiff, as part of the commencement of a criminal proceeding, has been unlawfully and forcibly restrained in violation of the Fourth Amendment and injuries, due to that seizure, follow as the prosecution goes ahead." *Uboh v. Reno*, 141 F.3d 1000,1003 (11th Cir. 1998) (citing *Whiting v. Traylor*, 85 F.3d 581, 584 (11th Cir. 1996)).

> Where an arrest is made after the filing of an information and the arrest is the basis of a Fourth Amendment section 1983, . . . the tort of malicious prosecution is the most analogous tort to the section 1983 claim. In contrast, where an arrest is made before the commencement of a criminal proceeding, the most analogous tort might be that of "false arrest."

Whiting v. Traylor, 85 F.3d 581, 584 nn. 7-8 (11th Cir. 1996). The Eleventh Circuit differentiated the two causes of action,

14. In this case there is much controverted evidence regarding Overman's alleged impairment at the time of the stop. In Florida, evidence of psychomotor field sobriety tests are admissible as lay observations; however, courts have cautioned that the significance of these tests should not be elevated above other lay observations of intoxication. *State v. Meador*, 674 So. 2d 826, 836 (Fla. 4th Dist. Ct. App. 1996).

false arrest versus malicious prosecution, because a criminal prosecution commences "with the filing of an information . . . or at least an arrest pursuant to a[n] . . . arrest warrant." *Id.* at n.7.

In this case the arrest was made prior to the filing of an information or the issuance of an arrest warrant. The SAO decided against a prosecution and filed an announcement of "no information" thereby dismissing the case. Summary judgment for Taylor as to Count II must be granted because there was no prosecution.

B. Summary Judgment as to Jones (Count III)

Any claims against Jones in his official capacity are actually claims against the BSO and will be discussed below as part of the analysis of Jenne's motion for summary judgment. *Busby v. City of Orlando*, 931 F.2d 764, 776 (11th Cir. 1991). An officer sued in his individual capacity is entitled to qualified immunity if his discretionary acts did not violate clearly established constitutional or statutory rights of which a reasonable person would have known. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982). A claim for malicious prosecution may lie where all of the following elements are met: 1) the commencement or continuance of an original criminal or civil judicial proceeding, 2) its legal causation by the present defendant against the present plaintiff, who was the defendant in the original proceeding, 3) its bona fide termination in favor of the present plaintiff, 4) the absence of probable cause for such proceeding, 5) the presence of malice therein, and 6) damage conforming to legal standards resulting to the plaintiff. *Alamo Rent-A-Car*

v. Mancusi, 632 So. 2d 1352, 1355 (Fla. 1994). "If any of these elements is lacking, the result is fatal to the action." *Id.*

Jones's motion for summary judgment on the claim for malicious prosecution in his individual capacity must be granted because 1) there was no prosecution; 2) there is an absence of evidence that Jones acted with malice; and 3) there is no evidence that Jones participated in any of the decisions leading to Overman's arrest. In fact, when Jones came upon new information regarding the untruthfulness of Taylor, he immediately disclosed that information to his superiors. Prior to that, Jones had no reason to believe that Taylor had been untruthful.[15]

C. Summary Judgment as to Jenne (Counts VI and VIII)

When a state or its subsidiary is sued for negligence, a court first determines whether the plaintiff has alleged sufficient facts under which the state or its subsidiary, if a private entity, would be liable under Florida law. *Lewis v.*

15. Prior to Overman's arrest, according to Tyrie and Jones, Taylor was recognized as an excellent employee. Tyrie and Jones were not aware of any complaints regarding Taylor's training or performance. Jones was responsible for reviewing Taylor's reports and always found them to be well-written and complete. To his knowledge, Taylor had never been untruthful in any of his reports nor had he omitted any material information. Taylor's reports were also routinely reviewed by the SAO and defense attorneys representing criminal defendants arrested for DUI. Jones had never received a complaint regarding Taylor's reports or integrity. To the contrary, Taylor had received numerous commendations from citizens, law enforcement officers and from the SAO.

City of Petersburg, 260 F.3d 1260, 1265 (11th Cir. 2001) (citation omitted). "To state a claim for negligence under Florida law, a plaintiff must allege that the defendant owed the plaintiff a duty of care, that the defendant breached that duty, and that the breach caused the plaintiff to suffer damages." *Id.*

Plaintiff has not presented any evidence of prior incidents which involve Taylor making unlawful arrests. The record in this case demonstrates conclusively that any violations of Overman's rights were the result of Taylor's intentional act of arresting Overman and submitting the probable cause affidavit to the SAO, not the result of any negligence in the selection, appointment, training, supervision or retention of Taylor. Taylor was, by all accounts, a highly trained officer[16] and Jones provided more than adequate supervision.

Liability under 42 U.S.C. section 1983 cannot be based on the doctrine of respondeat superior. *Braddy v. Fla. Dept of Labor and Employment Sec.*, 133 F.3d 797, 801 (11th Cir. 1998) (citations omitted). A governmental entity can be held liable pursuant to section 1983 only if the constitutional

16. Taylor earned a Bachelor's degree in Psychology from the University of Pennsylvania and attended the Broward County Police Academy where he was taught the basics of law enforcement, including courses on making arrests, probable cause, DUI enforcement and report writing. He also attended several higher-level training courses on DUI enforcement, including the DUI Standard Field Sobriety Testing Course and the Chemical Test Technician Course. After passing the DUI Instructor Course Taylor was certified as a DUI instructor and has taught DUI courses for the Fort Lauderdale Police Department. He is one of the few law enforcement officers in the State of Florida certified as a Drug Recognition Expert.

violation at issue resulted from its custom, policy, or practice. *Monell v. Department of Social Services*, 436 U.S. 658 (1978). The plaintiff must show that the defendant promulgated or permitted a custom or policy which was the moving force behind the alleged deprivation. *Sewell v. Town of Lake Hamilton*, 117 F.3d 488 (11th Cir. 1997). The plaintiff in this case has proven neither because of the absence of evidence that BSO was deliberately indifferent in its training and supervision of employees or of an unlawful custom or policy of false arrests or malicious prosecutions. Accordingly, summary judgment for Jenne must be granted as to Counts VI and VIII.

Appendix D

CONCLUSION

For the reasons stated above, it is *ORDERED AND ADJUDGED* that:

1. Defendant Andrew Taylor's Motion for Summary Judgment [D.E.84] is **GRANTED in part and DENIED in part;**

2. Defendant Kenneth C. Jenne, II's Motion for Summary Judgment [D.E. 93] is **GRANTED**; and

3. Defendant Frederick Jones's Motion for Summary Judgment [D.E.94] is **GRANTED. DONE AND ORDERED** in Chambers at Ft. Lauderdale, Florida, this day of September, 2002.

s/ Wilkie D. Ferguson, Jr.
WILKIE D. FERGUSON, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT FILED JULY 12, 2004

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 03-16296-GG

EDWARD OVERMAN,

Plaintiff-Appellant,

versus

BROWARD SHERIFF'S OFFICE,
Kenneth C. Jenne, II, in his official capacity
as the Sheriff of Broward County, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19__, ____F.2d____).

Before: BIRCH, DUBINA and COX, Circuit Judges.

PER CURIAM:

The Petition (s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that

the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/ E.R. Cox
UNITED STATES CIRCUIT JUDGE

(2)

Supreme Court, U.S.
FILED
2004
OFFICE OF THE CLERK

No. 04-494

IN THE

Supreme Court of the United States

EDWARD OVERMAN,

Petitioner,

v.

ANDREW TAYLOR,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

When considering the "totality of the circumstances" under the Eleventh Circuit's standard of "arguable probable cause," is it appropriate to ignore knowing, willful and deliberate misconduct by a law enforcement officer including falsifying a probable cause affidavit, lying to supervisory personnel and lying to the prosecuting agency, when considering the defense of qualified immunity.

As the body of this Brief makes clear, the underlying basis for the question presented for review by Petitioner is not supported by the record evidence, nor the Eleventh Circuit's holding; specifically there were no false statement contained in the probable cause affidavit, the alleged misconduct of Respondent, Taylor, calls for an analysis of his subjective intent, which is contrary to the dictates of this Court.

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U.S. Sup. Ct. Rule 10 12

Respondent, Andrew Taylor, requests that this Court deny the Petition for Writ of Certiorari seeking review of the Opinion entered by the United States Court of Appeals for the Eleventh Circuit in this case on May 7, 2004.

STATEMENT OF THE CASE

Respondent, Andrew Taylor, cannot accept the "statement" submitted by Petitioner, Edward Overman, because it contains many false statements of facts, misstatements of facts, and facts irrelevant to the proper disposition of Overman's Petition. Respondent, Taylor, submits the following, taken verbatim from the Order of the United States District Court for the Southern District of Florida granting Taylor's Renewed Motion for Summary Judgment, dated November 14, 2003, Appendix B to Petition.

On September 17, 1997, at about 2:00 a.m., Plaintiff Edward Overman, who was at that time the Chief of the Oakland Park Police Department, was arrested by BSO Deputy Andrew Taylor for driving under the influence ("DUI"). Taylor subsequently completed a probable cause affidavit detailing the grounds upon which he had concluded there was probable cause to believe Overman was impaired while operating a motor vehicle. Further evidence concerning whether probable cause existed has been developed in court documents and through discovery and will be summarized below. The following factual summary is based on both Defendant Taylor's Renewed Summary Judgment Motion and Reply, Plaintiff's Response to Defendant's Motion, and an independent review of the record.

Taylor, a member of the BSO's DUI Task Force, had initiated surveillance of Overman on September 17, 1997,

on a tip from William Washington, a former Oakland Park Police Department employee whose employment had been terminated by Overman due to allegations of misconduct. Washington, who had been informed by another member of the Oakland Park Police Department that Overman was at the Cheers Bar and Grill, claims to have witnessed Overman consume two to four alcoholic drinks. Washington contacted BSO dispatcher and left a message with Taylor, who called Washington on his cellular phone. Washington told Taylor that Overman was drunk and was about to drive from the bar. Upon meeting outside of Cheers about fifteen to twenty minutes later, Washington told Taylor that, by that time, he had observed Overman consume four to six drinks.[1] Taylor waited for 30 to 40 minutes outside the bar and followed Overman's car when he observed it leaving the parking lot. After following him for about three miles, Taylor discontinued following Overman after seeing no signs of impairment and observing no traffic infractions. Taylor then called Washington to inform him of this, but Washington apparently stated that he was going to call the BSO because Overman was going to kill someone.[2]

Taylor subsequently turned around, caught up with Overman, and began to follow him again. Thereafter, Taylor states that he saw Overman's vehicle weave out of his lane, into the next lane, and back into his lane again.[3] Taylor then

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1. There is some dispute in the record as to how many total drinks Washington told Taylor he had observed Overman consume.

2. In fact, although Taylor had no knowledge of this, Washington did call BSO 911 and reported Overman's driving pattern and that he was impaired.

3. There is no video recording showing this alleged traffic infraction, and Taylor did issue a citation for it.

turned on his onboard video camera[4] and observed Overman stop beyond the white stop bar at a traffic light at University Drive and then make a right turn and immediately cross several lanes to the far left lane. Overman admitted in his deposition that he stopped past the white stop bar at that light, that he went into the left lane without first straightening out in the right lane, and that he did not use his left turn signal to indicate he was changing lanes. Taylor then pulled Overman over for violating two Florida Motor Vehicle Statutes due to these actions and issued two traffic citations.[5]

Plaintiff contends that his experts, after review of the videotape recorded on Taylor's onboard camera, concluded that Overman did not commit any traffic infractions. However, statements from their affidavits indicate otherwise. Plaintiff's experts Kenneth Harms admitted that "the stop that I saw [in the video] occurred partially ever, as I recall, and to the west of the stop bar itself. There was then a subsequent turn to the right, Overman was in the right lane for a very brief moment in time. And he then moved across the center lane and into the left thru lane."[6] Plaintiff's other

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4. Although Plaintiff alleges that Taylor had previously activated his video camera during the initial three-mile surveillance of Overman and that he erased this footage, there is no evidence in the record that this occurred and, even if it had, it would create no material dispute given Taylor's concession that he observed no signs of impairment or traffic infractions until after he had turned around and caught back up with Overman.

5. Florida Statutes § 216.075(3)(a)(1) states that vehicles must stop before the white line at intersections. Florida Statutes § 316.151(1) states that right turns must be made "as close as practicable to the right-hand curb or edge of the roadway."

6. Harms stated that he would discourage officers from stopping for these types of infractions and that he would not use a stop for (Cont'd)

expert, Steven Liebowitz, stated that "[y]ou're supposed to stop before the white bar" and that stopping after that bar "is, yes, absolutely a technical traffic infraction," merely noting that "I distinguish between what a reasonable prudent officer would make a stop for."[7]

Upon stopping him, Taylor asked Overman if he suffered any physical infirmities or was on any medication. Overman responded in the negative to both questions. Taylor also asked Overman whether he had consumed any alcohol, to which Overman admitted he had consumed "a couple of drinks," stating later that he had consumed three beers. Taylor detected the odor of alcohol on Overman's breath, observed that his eyes were bloodshot, and noted that his face appeared flushed. Taylor had been trained that these conditions could be physical signs of impairment due to alcohol consumption. Overman does not dispute that the odor of an alcoholic

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(Cont'd)

this type of violation as a pretext for checking to see if a driver was under the influence. However, he does not state that the stop was illegal, stating, instead, that he would only stop drivers for this type of violation in order to give them a warning. Further, he noted that if he had stopped someone on that basis and the observed sufficient indications that the driver might be impaired, he would have then administered roadside sobriety tests.

7. Even when taken in the light most favorable to the Plaintiff, Overman's experts' dispute over whether Overman actually violated the Florida Statutes that Taylor citing him for violating, this factual dispute is immaterial because, as discussed below, based on the undisputed statements of Overman and his experts, the Court concludes that a reasonable officer could have determined that Overman's actions constituted traffic infractions for which a stop was authorized, even if, in fact, Overman did not commit the infractions.

beverage was coming from his mouth. There are indications that Overman's eyes may have been red because he had been awake for twenty hours and that his face was sunburned, rather than flushed.

Overman voluntarily consented to perform roadside sobriety tests: the horizontal gaze nystagmus test, the standing balance or standing count test, the walk-and-turn test, and the finger-to-nose test. Although Plaintiff's expert disputes that all of these tests were administered correctly, Taylor (1) noted a lack of smooth pursuit and nystagmus at maximum deviation during the horizontal gaze nystagmus, (2) recorded that Overman had a slight sway and estimated thirty seconds when only seventeen had passed on the Rhomberg balance test, (3) indicated that Overman lost his balance during instructions, stepped off to the side, and left gaps of one to two inches several times on the walk-and-turn test, and (4) reported that Overman swayed, lost his balance twice, dropped his foot, and raised his arms twice on the one-leg stand. Overman admitted that he did not do the balancing tests well, likely due to hearing and inner ear problems. However, he also admitted that he knew of these hearing problems before his arrest by Taylor and that he did not tell Taylor about these medical problems. Taylor stated that he had specifically asked Overman if he had any medical infirmities prior to conducting the roadside sobriety tests. Overman further admitted that he stepped off to the side while attempting to walk in a straight line on the walk-and-turn test.[8]

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8. Overman and his expert, Liebowitz, allege that Taylor deliberately misinstructed Overman on at least two of the tests and conducted the horizontal nystagmus test incorrectly. Despite the dispute over whether all of these tests were administered entirely

(Cont'd)

Subsequent to these roadside tests, Taylor stated that he felt he had probable cause to establish impairment due to alcohol consumption and arrested Overman for driving under the influence in violation of Florida Statutes § 316.193. He transported Overman back to the BSO, where Overman voluntarily submitted to two intoxilyzer or breath tests conducted by Community Service Aid Franca DiCienzo. The first test indicated a blood alcohol content of .043 grams of alcohol per 210 liters of breath and the second indicated .039 g/210L. In Florida, a breath test of less than .05 g/210L creates a presumption that the person was not impaired, no presumption can be drawn from a breath test of between .05 and .08, and a breath test of .08 or above creates a presumption of impairment. Overman's breath test was conducted about an hour and ten minutes after he was stopped by Taylor.[9]

(Cont'd)

correctly, the Court finds that there is no material dispute in this regard because, as discussed below, Overman's admissions regarding his performance on these tests are sufficient to support that Taylor had arguable probable cause for an arrest. Liebowitz also claims that Taylor should not have used one of the tests that he administered – the finger-to-nose test – because it is not validated by the State of Florida. Liebowitz then admits that his department does use that test and "imposes it upon" him. Thus, Plaintiff would be hard pressed to demonstrate that it was clearly established that use of this test is improper.

9. Assistant State Attorney Lee Cohen indicated that his office would prosecute someone with a low breath test for DUI "[i]f there's other evidence of impairment or if there are other substances impairing them." He further noted that the breath tests were taken "an hour and one minute or so after the incident. So his breath alcohol level at the time of driving certainly could have been higher . . . And

(Cont'd)

At the BSO, Taylor completed a probable cause affidavit, which was subsequently filed with the court and provided to the State Attorney's Office (SAO). The affidavit did not include any reference to Washington, nor did it indicate that Taylor had been acting on a tip of any kind when he stopped Overman. However, in the affidavit, Taylor did set forth many of the other facts noted above, indicating that he saw the defendant weave in and out of his lane, not come to a complete stop at University Road, and then make a wide right turn. The affidavit further recorded Taylor's above-noted observations regarding Overman's appearance and physical signs of possible impairment, report Overman's verbal statements regarding having no illnesses, injuries or medication and that he had consumed three drinks, and summarized Overman's performance on the roadside sobriety tests. Assistant State Attorney ("ASA") Lee Cohen noted in his deposition that "there was nothing that we found that wasn't true in the probable cause affidavit." The probable cause affidavit was taken with Overman to the main jail, where Overman was booked and later released.

It is undisputed that Taylor did not reveal everything that might have been relevant to this case, either in the probable cause affidavit or during a meeting with the SAO on August 18, 1997.[10] He did not disclose that he had initially received

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(Cont'd)
people can very easily be impaired with breath alcohol levels of .05 . . . So if he's impaired, whether it's due to his age, his physical condition, or a combination of everything, if he's impaired and he's impaired at an .05, you know, there could be a case to charge." Plaintiff's expert, Liebowitz, admits that charges can be filed for DUI on a breath test indicating less than .05 g/210L.

10. In fact, much of Plaintiff's statement of facts in response to this motion for summary judgment discusses items that were omitted (Cont'd)

a tip from Washington, that he had waited outside of Cheers for nearly forty minutes, and that he had followed Overman for three miles without observing traffic infractions or signs of impairment. Taylor claims he did not identify Washington as a witness in the probable cause affidavit because he did not believe Washington was a witness. In response to questions asked during the meeting with the SAO, Taylor falsely stated that he did not know that Overman was the Chief of the Oakland Park Police Department until after the arrest, denied any knowledge of Washington, and failed to disclose Washington's involvement in the arrest, stating instead that Taylor had come upon Overman innocently while patrolling. On August 18, 1997, subsequent to the meeting with the SAO, Taylor did reveal Washington's involvement and other circumstances involving Overman's arrest to his supervisor, Jones. These additional facts were related to the SAO on August 20, 1997, which decided to wait until some additional witnesses had been interviewed before making a filing decision of the case.[11] On August 27, 1997, the SAO decided not to prosecute and filed a "no information"

(Cont'd)

from the probable cause affidavit and not related by Taylor to the SAO. Further, his argument against summary judgment relies heavily on the absence of this "exculpatory" information, alleging that this provides a basis for finding there are material factual disputes as to whether arguable probable cause for the arrest existed.

11. While Plaintiff's allegation that "no Defendant informed prosecutors of Taylor's lies and omissions" may technically be true, prosecutors were advised, within three days of the arrest, of all the background facts, including Washington's involvement and Taylor's admissions, by two Office of Professional Compliance investigators from the BSO. *See* September 20, 2002 Order on Motions for Summary Judgment at 6.

dismissing the case. Taylor, who had been put on restricted administrative assignment on August 18, 1997, was subsequently discharged from the BSO. However, ASA Cohen noted in his memorandum concerning filing a "no information" and in his subsequent testimony that Taylor had probable cause for the arrest and that his actions with regard to Overman did not constitute criminal conduct.

REASONS FOR DENYING THE PETITION

The decision below does not conflict with the dictates of this Court. Contrary to Overman's representation, the lower courts did not look to what Taylor allegedly and subjectively could have believed in determining that he was entitled to qualified immunity. To the contrary, the Eleventh Circuit's first Opinion filed August 14, 2003 (Appendix C to Petition) remanded the case to the Trial Court specifically on the ground that the Eleventh Circuit found that the Trial Court improperly considered Taylor's subjective motive or intent in contravention of the principles of qualified immunity. The Trial Court was instructed to reevaluate Taylor's claim for qualified immunity under the two-part framework articulated in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 2156 (2001).

Overman's Petition herein is replete with his interpretation of Taylor's subjective intent and motive in support of his argument that issues of material fact were present at the time of summary judgment.

In fact, the Trial Court below took pains to comply with the Eleventh Circuit's instruction on remand and specifically set forth that the Court must first determine whether the facts, taken in the light most favorable to the party asserting the

injury, shows that the official's conduct violated a constitutional right. If so, then the Court must determine whether that constitutional right was "clearly established" at the time of the alleged violation. For a right to be clearly established for qualified immunity purposes, it must be "sufficiently clear that a reasonable official would understand that what he is doing violates that right. That is not to say an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in light of pre-existing law the unlawfulness must be apparent." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). The Trial Court further defined the "reasonable officer" standard as an entirely objective standard and correctly stated that the subjective intention of the officer is irrelevant when determining whether the officer is entitled to a defense of qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *Lee v. Ferraro*, 284 F.3d 1188, 1193 n.2 (11th Cir. 2002), *rehearing on en banc denied*, 2002 WL 1049396 (11th Cir., May 13, 2002).

As the Trial Court correctly noted in its Order granting Taylor's Renewed Motion for Summary Judgment, there is no evidence to support Overman's accusations that the probable cause affidavit contained false statements and lies. At best, the probable cause affidavit omitted the information pertaining to Washington. However, each statement in the probable cause affidavit was true and corroborated by the officer who performed the breath tests, F. DiCienzo, and Assistant State Attorney Lee Cohen, who testified specifically that Taylor had probable cause for the arrest and that his actions with regard to Overman did not constitute criminal conduct. Additionally, Overman's own expert testified that his traffic infractions were grounds for a stop. All witnesses agreed that the videotape corroborated Taylor's probable

cause affidavit. Overman's accusations to the contrary are not only unfounded but are not supported by the record evidence including his own admissions at deposition and his experts' deposition testimony.

Overman's continued and persistent accusations of manufactured evidence and falsifying of probable cause affidavit have never been supported by any record evidence in this case, nor can Overman point to any evidence in the record to substantiate these meritless accusations.

The question of whether a reasonable officer could have believed that he had probable cause for an arrest is a question for the Court, not for the trier of fact. *Hunter v. Bryant*, 502 U.S. 224, 228, 112 S. Ct. 534, 536-537 (1991). This Court has previously held that the qualified immunity standard gives ample room for mistaken judgment by protecting all but the plainly incompetent or those who knowingly violate the law. *Hunter*, *supra*, 502 U.S. at 229, 112 S. Ct. at 537.

Where, as here, an officer has probable cause to believe that an individual has committed even a very minor criminal offence in his presence, he may, without violating the Fourth Amendment, arrest the offender. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354, 121 S. Ct. 1536, 1557 (2001).

The essence of Overman's Petition is based upon the purported subjective motives and intent of Taylor, to wit; that he received a tip from Washington, a disgruntled ex-employee of Overman, which initiated his interest in Overman, and the omission of the reference to Washington in the probable cause affidavit. The allegations of subjective intent and motive are improper considerations for purposes of qualified immunity. Moreover, they are irrelevant to the

independent determination of probable cause made by Taylor based upon his observations of Overman committing three traffic infractions in his presence, the odor of alcohol and the admission to having consumed alcohol, the poor performance on the road sobriety tests coupled with Overman's denial of any physical or medical problems which would have explained some of his poor performances, had he truthfully revealed them at the time, the independent officer's physical observations of Overman at the time of the breathilyzer test, and the independent determination by the Assistant State Attorney that the probable cause affidavit did not contain false statements and that Taylor had probable cause for the arrest.

The rulings of the Trial Court and the Court of Appeals for the Eleventh Circuit clearly do not conflict with the dictates of this Court, but rather have been guided by this Court's previous Opinions and have issued the subject Orders in accordance thereto.

Overman has completely failed to invoke this Court's discretionary jurisdiction on this Petition for Writ of Certiorari. The Petition does not raise the compelling reasons that would invoke this Court's discretion, but rather, this Petition clearly asserts error consisting of erroneous factual findings and misapplication of a properly stated rule of law. Overman has not met his burden of raising compelling reasons for the invocation of this Court's judicial discretion. U.S. Sup. Ct. Rule 10. *Braxton v. United States*, 500 U.S. 344, 347, 111 S. Ct. 1854, 1857 (1991). The Eleventh Circuit's decision does not conflict with the dictates of this Court and should be affirmed.

CONCLUSION

For the foregoing reasons, Respondent, Andrew Taylor, asks that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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JAN 5 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

CITY OF NEW YORK, JASON TURNER, individually and in his capacity as Commissioner of New York City Human Resources Administration, GEORGE SANTIAGO, in his individual capacity,

Petitioners,

—v.—

UNITED STATES OF AMERICA, NORMA COLON, MARIA E. GONZALEZ, TAMMY AUER, THERESA CALDWELL-BENJAMIN,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT TAMMY AUER'S BRIEF IN OPPOSITION

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January 5, 2005

QUESTIONS PRESENTED

Title VII of the Civil Rights Act of 1964 authorizes employees to sue their employers for sexual and racial discrimination and harassment in the workplace. The questions presented are:

1) Whether workers in New York City's work experience program established under the 1996 welfare reform law can qualify as "employees" under the common law agency principles that govern employee status under Title VII.

2) Whether Title VII was impliedly preempted by the non-discrimination provision in the 1996 welfare reform law.

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STATEMENT OF THE CASE

A. Nature of the Case

The respondents are suing the City of New York (the "City") under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., the federal law that prohibits employment discrimination on the basis of race, sex, religion or national origin. The four individual respondents allege that they were sexually or racially harassed in violation of Title VII while working for the City in exchange for their welfare benefits in a work experience program established by the City under the 1996 federal welfare reform law. The City moved under Fed. R. Civ. P. 12 (b)(6) to dismiss respondents' claims, contending that respondents are not covered by Title VII. It now challenges an interlocutory decision by the court of appeals vacating the district court's dismissal. The City petitions for review of the interlocutory holding that a work experience program worker can qualify as an "employee" under the Title VII employee standard, an issue that no other federal court of appeals has addressed. The City also petitions for review of the interlocutory holding that Title VII was not impliedly preempted by the non-discrimination provision in the 1996 welfare law, likewise an issue that no other court of appeals has addressed.

B. PRWORA – The 1996 Welfare Reform Law

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), ended the previous program for assisting needy families, Aid to Families With Dependent Children, and authorized the new work-focused Temporary Assistance to Needy

Families (TANF) program, codified at 42 U.S.C. § 601 et seq. PRWORA requires states to ensure that certain percentages of TANF families participate in "work activities." 42 U.S.C. § 607(a). PRWORA specifies twelve permissible work activities, 42 U.S.C. §§ 607(d)(1)-(d)(12), Petitioners' Appendix ("Pet. App.") A155, including "work experience . . . if sufficient private sector employment is not available," 42 U.S.C. § 607(d)(4), Pet. App. A155. When an individual refuses to participate in a work activity, PRWORA requires the state to "(A) reduce the amount of assistance otherwise payable to the family pro rata (or more, at the option of the State) . . . ; or (B) terminate such assistance." 42 U.S.C. § 607(e)(1), Pet. App. A156.

C. The New York City Work Experience Program

In New York State, the PRWORA program is operated by local social services districts, one of which is New York City, subject to rules set by state statute and regulation. In 1997, New York State enacted a welfare reform law to implement PRWORA, 1997 N.Y. Laws, ch. 436, authorizing the creation of programs of "work experience in the public sector or non-profit sector ... if sufficient private sector employment is not available." N.Y. Soc. Serv. Law § 336(1)(d), Pet. App. A254. In response to this state statute, New York City created the Work Experience Program (WEP) at issue in this case. Under the state law, the City must calculate the maximum required number of hours of WEP work by dividing the recipient's welfare grant by the applicable minimum wage. N.Y. Soc. Serv. Law § 336-c(2)(b), Pet. App. A259. WEP workers must be "provided appropriate workers' compensation or equivalent protection for on-the-job injuries and tort claims protection on the same basis, but not necessarily at the same benefit level, as they

are provided to other persons in the same or similar positions," and "the project to which the participant is assigned [must be one that] serves a useful public purpose." N.Y. Soc. Serv. Law §§ 336-c(2)(c)&(d), Pet. App. A260. WEP workers must also be reimbursed for their authorized child care and transportation expenses. N.Y. Soc. Serv. Law § 332-a, Pet. App. A236. A recipient who refuses to work incurs a pro rata reduction of her household's grant, *i.e.*, if the refusing recipient is a single parent with one child, the household's grant is cut in half. N.Y. Soc. Serv. Law § 342, Pet. App. A273-74.

D. Respondent Tammy Auer

In 1997, the New York City welfare agency assigned respondent Tammy Auer to perform general office work at the New York City Sanitation Department. As summarized by the court of appeals, her complaint alleges that she was sexually harassed by her Sanitation Department supervisor over the period of approximately eighteen months that she worked for the department, with the harassment including repeated sexually charged comments and invitations and inappropriate touching. Pet. App. A7-8. Ms. Auer filed a complaint with the Equal Employment Opportunity Commission (EEOC), which, after finding reasonable cause to believe her allegations were true, referred her charge to the United States Department of Justice. *Id.* at A8.

E. District Court Proceedings

In May 2001, the United States brought a lawsuit against New York City alleging violations of Title VII, acting on behalf of Tammy Auer, Maria Gonzalez, Theresa Caldwell-Benjamin, and a fourth WEP worker who subsequently settled her claims and is no longer a

party to the action. Each of these women moved to intervene in the government's lawsuit. Respondent Auer's motion was granted with respect to her Title VII claim on July 23, 2004. *See* Rec. Doc. 39 at 2. In September 2001, Norma Colon, also a WEP worker, filed a separate lawsuit against the City alleging violations of Title VII.

The City moved to dismiss both lawsuits pursuant to Rules (12)(b)(1) and (12)(b)(6) of the Federal Rules of Civil Procedure. The City argued that WEP workers cannot be employees within the meaning of Title VII because they are not remunerated for their work, and that, assuming that WEP workers could satisfy the Title VII employee standard, PRWORA had impliedly preempted Title VII from applying to PRWORA work experience workers. The district court consolidated the lawsuits for the purpose of hearing and deciding the motions to dismiss. The district court assumed that jurisdiction existed and resolved the consolidated motions under Rule 12(b)(6). In an unpublished opinion and order dated March 8, 2002, Pet. App. A55, the district court granted the dismissal motions, holding that WEP workers cannot be employees under Title VII because they are not remunerated for their work. The district court did not reach the question of whether PRWORA had preempted Title VII.

F. Court of Appeals Proceedings

On February 13, 2004, the Second Circuit Court of Appeals vacated the district court's judgment and remanded the case for further proceedings with one judge dissenting. Pet. App. A1-52.

Concerning the Title VII employee standard, the court of appeals explained that under Second Circuit precedent, employee status is determined by a two-part test. *Id.* at A15. First, the putative employee must establish that she received remuneration from the putative employer in some form for her work, which need not be a salary but must consist of "substantial benefits not merely incidental to the activity performed." *Id.* (quoting *York v. Ass'n of the Bar*, 286 F.3d 122, 126 (2d Cir.), *cert. denied*, 537 U.S. 1089 (2002)). Second, if the putative employee establishes receipt of remuneration, employee status is then determined by applying the common law of agency factors articulated by this Court in *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-52 (1989). *Id.*

The court of appeals held that the district court had erred by finding as a matter of law that the plaintiff WEP workers were not remunerated for their work. *Id.* at A4. The court of appeals reasoned that plaintiffs' allegations of the receipt of benefits for their work including their cash assistance, their eligibility for workers' compensation, and their reimbursement for child care and transportation expenses would, if true, suffice to establish remuneration. *Id.* at A16. The court of appeals also noted that its conclusion was supported by the EEOC's interpretation of Title VII. *Id.* at A17-18.

Concerning PRWORA preemption, the court of appeals concluded that the City had not demonstrated the clear expression of congressional intent to preempt Title VII that is required to establish that one federal statute has impliedly preempted another. *Id.* at A35. The court of appeals rejected several arguments in support of preemption that the petitioners no longer advance, as well as the "expressio unius est exclusio alterius" argument

that the City renews here. *Id.* at A27-31. The court of appeals noted that its conclusion was supported by the federal agencies' interpretations of PRWORA and by PRWORA's legislative history. *Id.* at A31-35.

ARGUMENT

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED

None of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction favors review of the decision below. First, the case is in an interlocutory posture. Second, the alleged conflicts with other court decisions asserted by petitioners do not exist. Third, the City advances no compelling reason for granting certiorari. Fourth, review by this Court might have no prospective effect as Congress has not yet decided whether and in what form the TANF program at issue in this case will continue beyond March 31, 2005. Moreover, the court of appeals decision was correct.

I. None of the Usual Criteria That This Court Applies in Determining Whether to Exercise its Certiorari Jurisdiction Favors Review of the Decision Below

A. Review would be premature because the decision below is interlocutory

The court of appeals decision is interlocutory in nature. This Court has repeatedly stated that it "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction," even where the court of appeals has resolved the merits of the case and only the "determination of an appropriate remedy" remains. *Virginia Military Inst. v. United States*, 508 U.S.

946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari); *see also, e.g.*, *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (denying certiorari "because the Court of Appeals remanded the case" making it "not yet ripe for review by this Court.")

The decision below is not interlocutory in a merely technical sense. The court of appeals reviewed the district court's dismissal of the case "accepting all of the plaintiff's allegations as true and drawing all inferences in a manner favorable to the plaintiff," Pet. App. A14, and held only that "the allegations of plaintiffs' complaints sufficiently pleaded the individual plaintiffs' status as employees entitled to Title VII's protection." *Id.* at A36. On remand, the final results of the case might effectively moot the issues on which the City seeks review if the respondents are unable to prove their allegations, or if the City successfully advances other defenses that would preclude respondents from obtaining relief.

B. The alleged conflicts with other court decisions asserted by petitioners do not exist

1. The court of appeals decision does not conflict with the decision of another federal court of appeals on the same matter

This Court may grant certiorari when a court of appeals decision is "in conflict with the decision of another United States court of appeals on the same important matter." Sup. Ct. R. 10(a). In their "Question Presented," petitioners assert a conflict with two other federal court of appeals decisions, *O'Connor v. Davis*, 126 F.3d 112 (2d Cir. 1997), *cert. denied*, 522 U.S. 1114 (1998), and *Johns v. Stewart*, 57 F.3d 1544 (10th Cir.

1995). However, these cases did not involve the applicability of Title VII to work experience workers, and consequently did not decide the "same important matter." Moreover, *O'Connor* was, like the instant case, a Second Circuit decision, not the decision of "another" court of appeals, and this Court does not grant certiorari to resolve alleged intracircuit conflicts. *See Davis v. United States*, 417 U.S. 333, 340 (1974). Furthermore, both *O'Connor* and *Johns* are also otherwise distinguishable.

In *O'Connor*, a college student performed field work at a psychiatric hospital and received federal work study funding from the college she attended but no payments from the hospital. 126 F.3d at 113. She sued the hospital, the state that operated the hospital, and her hospital supervisor, who allegedly had sexually harassed her. *Id.* at 114. The Second Circuit held that the student did not qualify as a Title VII employee because she received no remuneration from the putative employer, the psychiatric hospital. *Id.* at 116. In contrast, in this case, as the court of appeals noted, Pet. App. A22, New York City -- the putative employer -- is both the payor and the recipient of the WEP workers' services, and thus the rationale of *O'Connor* does not apply.

In *Johns*, two welfare recipients who had participated in the work component of a Utah public assistance program sued the state welfare agency. They asserted that they had been required to work more than the number of hours determined by dividing their grant by the minimum wage in alleged violation of the requirements of the Fair Labor Standards Act (FLSA). *Johns*, 57 F.3d at 1551. The Tenth Circuit held that the plaintiffs were not protected by the FLSA because they were not "employees" within the meaning of the FLSA. In reaching this conclusion, the court of appeals applied

an "economic reality" test that focused "upon the circumstances of the whole activity." *Id.* at 1558-59 (citation omitted). The court of appeals reasoned that work was but "one component" of Utah's comprehensive public assistance plan, and that the overall relationship between the recipients and the welfare agency was an assistance relationship, not an employment relationship. *Id.* at 1559. (Notably, even the work component included not only community work, but also adult education and skills training. *Id.* at 1550.)

Johns is clearly distinguishable from the instant case. First, it did not involve Title VII. Second, the Utah work program antedated PRWORA and was not governed by PRWORA. *Cf. Frank v. United States*, 506 U.S. 932 (1992) (Stevens, J., respecting the denial of certiorari) ("[T]he Court's action is supported by the fact that a square conflict between two Courts of Appeals has not arisen since the enactment of the 1984 statute, and by the Court's normal practice of awaiting such a conflict before considering the significance of new federal legislation.") Third, even as to the FLSA, *Johns* predated the United States Department of Labor (DOL) Guide, issued following enactment of PRWORA, which states that the FLSA can apply to workers in welfare work programs, the first known DOL statement on this matter (discussed *infra* at p. 19). The *Johns* court might have reached a different result if it had been aware of the DOL interpretation. Fourth, the Tenth Circuit applied the "economic reality" test to determine FLSA employee status, not the common law agency test that determines employee status under Title VII.

Respondent is not aware of any other pending litigation raising the questions presented for review. Thus, there is no need for this Court to grant certiorari to

secure uniformity among the decisions of the courts of appeals. Indeed, the grant of certiorari on a novel issue in the absence of a conflict would deprive the Court of the benefit of a fully ventilated discussion of the issue among the courts of appeals. *See Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) ("Often a denial of certiorari will permit the state and federal courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court'") (quoting *McCray v. New York*, 461 U.S. 961, 963 (1983)).

2. The court of appeals did not decide a federal question in a way that conflicts with a decision by a state court of last resort

Another circumstance in which this Court may grant certiorari is when a court of appeals has decided "an important federal question in a way that conflicts with a decision by a state court of last resort." Sup. Ct. R. 10(a). Petitioners assert that the court of appeals decision is inconsistent with the decision by the New York Court of Appeals in *Brukhman v. Giuliani*, 94 N.Y.2d 387 (2000). City's Petition for Certiorari ("Pet.") 23.

Petitioners' contention is entirely unavailing. *Brukhman* did not involve Title VII or *any* federal question, but rather involved only the purely state law issue of whether "the prevailing wage provision of the New York State Constitution" applies to WEP workers. *Id.* at 390. While the New York Court of Appeals held that the prevailing wage provision was inapplicable, its decision involved only this state law question. In addressing this state law question, the *Brukhman* court neither invoked nor applied the common law agency test that determines employee status under Title VII.

Additionally, as the Second Circuit decision below explained in distinguishing *Brukhman*:

> [T]he New York Constitution grants special economic rights to certain classes of workers, *i.e.*, they must receive the prevailing wage in the community for the work they perform if the employer receives a public works contract. Title VII in contrast accords the basic civil right of freedom from discrimination to all employees employed by covered employers. In light of the very different scope of Section 17 [of the State Constitution] and Title VII, it would be foolhardy to assume that the New York Court of Appeals would extend its interpretation of the prevailing wage provision to Title VII.

Pet. App. A21-22.

C. Petitioners do not present any compelling reason for granting certiorari

This Court may also grant certiorari for "compelling reasons" other than those delineated in the Court's rules. Sup. Ct. R. 10. The City contends that the court of appeals decision "has limited the City's ability to conduct the [WEP] program in a manner optimally calculated to serve its intended purpose," Pet. 20, and apparently argues that this alleged result is a compelling reason for granting the petition.

However, the court of appeals decision in no way inappropriately hinders the City's ability to administer the WEP program. The decision holds only that WEP

workers may have a remedy under Title VII for sexual or racial discrimination. To the extent that the result of the decision is to reduce discrimination in the WEP program, this in an appropriate limitation on WEP administration. Indeed, the City acknowledges that discrimination against WEP workers is illegal under a state law provision, and asserts that the "City is strongly committed to enforcing this provision and to preventing discrimination against WEP participants." Pet. 4 n.4. The City offers no reason to conclude that the court of appeals decision will hinder, rather than help, the City in accomplishing its anti-discrimination goals.

In support of its hindrance argument, the City asserts that if WEP workers can be employees within the meaning of Title VII, they can also be employees with a right to unionize under the National Labor Relations Act (NLRA), and that an attempt by WEP workers to unionize "could cripple WEP," Pet. 20, a sweeping assertion for which the City offers no evidence. However, the instant case neither addresses nor decides employee status and the right to unionize under the NLRA. If possible unionization is the City's real concern, the City should wait for a case involving unionization to argue these matters.

D. Review by this Court might have no prospective effect as the federal welfare statute at issue in this case may not continue in its present form beyond March 31, 2005

As enacted by PRWORA, the TANF program was scheduled to expire on September 30, 2002. Over the past two years Congress has considered but not enacted a long-term reauthorization. In lieu of a long-term reauthorization, Congress has enacted eight short-term

extensions of TANF, continuing funding and the authority for program activities without program changes. The latest in this series of short-term extensions, Pub. L. No. 108-308, 118 Stat. 1135 (2004), extends TANF until March 31, 2005.

This Court's rules indicate that this Court grants certiorari to consider "important" questions. Sup. Ct. R. 10. Given the TANF program's uncertain future, a decision by this Court on the matter presented here for review might have only retrospective effect. Consequently, the matter presented for review is not the type of "important" matter that merits review by this Court. *Cf. Murel v. Baltimore City Criminal Ct.*, 407 US 355, 358 (1972) (dismissing certiorari as improvidently granted in view of pending revision of the statute at issue). Furthermore, as it seems highly likely that Congress will resolve TANF's future status before a final judgment in the underlying case as a whole, this Court would be better able to determine the importance of the matter presented for review following final judgment, should petitioners at that time still desire to seek review.

II. The Court of Appeals Decision Was Correct

The City argues that this Court should grant certiorari because the court of appeals decision was erroneous. Pet. 21. However, this Court generally does not grant certiorari just because the decision below may be erroneous. *See, e.g, Ross v. Moffit*, 417 U.S. 600, 616-17 (1974) ("This Court's review . . . is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review"); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (the jurisdiction of the Supreme Court to review cases by way of certiorari "was not conferred upon this Court

merely to give the defeated party in the Court of Appeals another hearing"). Moreover, the decision below was correct.

A. The court of appeals correctly decided that WEP workers may qualify as employees under Title VII

This Court has repeatedly instructed the lower courts to apply common law agency principles to determine if an individual qualifies as an employee where, as in the case of Title VII, the statute containing the term does not helpfully define it. *Clackamas Gastroenterology Assocs., P. C., v. Wells*, 538 U.S. 440, 444-45 (2003); *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322-23 (1992); *Community for Creative Non-Violence,* 490 U.S. at 739-40. Under Second Circuit Title VII precedent, before applying the common law agency test, a putative employee must meet a threshold test of receipt of remuneration from the putative employer. If the remuneration test is satisfied, employee status is then determined by applying the common law agency principles. *Compare Pietras v. Bd. of Fire Comm'rs*, 180 F.3d 468, 471, 473 (2d Cir. 1999) (volunteer firefighter who receives no salary but who is entitled to "(1) a retirement pension, (2) life insurance, (3) death benefits, (4) disability insurance, and (5) some medical benefits" may satisfy the remuneration requirement), *with York v. Ass'n of the Bar*, 286 F.3d at 126 (bar association volunteer's receipt of benefits merely incidental to the volunteer activity, such as "clerical support and networking opportunities," does not satisfy the remuneration requirement), *and O'Connor v. Davis*, 126 F.3d 116 (student intern who receives no remuneration from the putative employer does not satisfy the remuneration requirement).

This Court has not addressed the specific issue of whether remuneration is always necessary for employee status, as the Second Circuit has held. However, neither petitioners or respondents herein challenge this principle, and indeed the City focuses on the remuneration issue, seeming to "tacitly concede," as the court of appeals suggests, Pet. App. A16, that the plaintiff WEP workers do otherwise qualify as employees under the common law agency test.

The City contends that the court of appeals misapplied the Second Circuit's remuneration principle. This contention does not merit this Court's consideration. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law.") Moreover, the City's contention is incorrect.

The City bases its misapplication argument on the assertion that "[b]enefits that are not contingent upon the performance of work cannot be deemed payment for that work." Pet. 26. However, the court below correctly found that once a TANF recipient is assigned to perform work in the WEP program, the share of the household's cash payment attributable to her *is* contingent on the performance of work. Pet. App. A16 ("A plaintiff who unjustifiably refused to work would lose the portion of the family's grant attributable to her.") The City can not reasonably dispute this fact and at least tacitly concedes it. *See* Pet. 25 ("Refusal to comply with any of these requirements may lead to a reduction or termination of benefits.") The City also implicitly concedes that WEP workers are covered by workers' compensation and are reimbursed for their child care and transportation costs. *See id.* at 26. These conceded forms of remuneration are

exactly what the court of appeals relied on in correctly deciding that the remuneration test was satisfied. Pet. App. A16-17.

Furthermore, as the court of appeals decision explains, the conclusion that WEP workers may qualify as employees is supported by the position of the EEOC, the agency charged with enforcing Title VII. *See* Pet. App. A17-19 (quoting EEOC Notice No. 915.002, *Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms*, at Q&A No. 5 (Dec. 3, 1997), *available at* http://www.eeoc.gov/policy/docs/conting.html (last visited Nov. 28, 2004); and EEOC Compl. Man. (BNA) § 2-III(A)(1)(a), at 605:0009 (2002)). The EEOC's interpretation is "entitled to respect" to the extent it has the "power to persuade," pursuant to this Court's decision in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346 (1997) (deferring to the EEOC's interpretation of "employee" as including "former employee").

B. The court of appeals correctly decided that PRWORA does not preempt Title VII

The court of appeals correctly rejected the City's arguments that PRWORA preempted Title VII from applying to workers in the WEP program. Pet. App. A26-35. Petitioners no longer advance several arguments in support of preemption that they pressed below, but continue to make an "expressio unius est exclusio alterius" argument in favor of preemption. That argument is that the absence of Title VII in the non-discrimination statutes listed in 42 U.S.C. § 608(d) indicates a congressional intent to preempt Title VII.

42 U.S.C. § 608(d), Pet. App. A174-75, provides under the caption "Nondiscrimination provisions":

> The following provisions of law shall apply to any program or activity which receives funds provided under this part:
>
> (1) the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.)
>
> (2) Section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794)
>
> (3) The Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.)
>
> (4) Title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.)

The common link among the four listed statutes is that each prohibits discrimination in activities other than employment in programs or activities that receive federal assistance or, in the case of the Americans with Disabilities Act, that are operated by a public entity. As the court of appeals pointed out, these laws reach programs and activities "like education and vocational training that, due to the absence of an employment relationship, clearly are not subject to Title VII. Title VII, on the other hand, governs employment relationships whether federally funded or not." Pet. App. A27.

The court of appeals reasoned that the expressio unius maxim only applies "when the statute identifies 'a series of two or more terms or things that should be understood to go hand in hand' " (quoting *Chevron U.S.A., Inc., v. Echazabal*, 536 U.S. 73, 81 (2002)), thus raising the inference that a similar unlisted term was deliberately excluded. The court of appeals correctly concluded that the expressio unius maxim does not apply

in this instance because Title VII differs in its applicability from the listed statutes.

The City does not challenge the principle of law stated by the court of appeals that the expressio unius principle applies only when the omitted term goes hand in hand with the listed terms, but rather argues that the court of appeals misapplied the principle. However, as noted above, the asserted misapplication of a rule of law does not support certiorari review.

Moreover, the City is incorrect that the court of appeals misapplied the hand-in-hand principle. The City bases this argument on the fact that, like Title VII, two of the listed statutes have provisions that ban employment discrimination. However, unlike Title VII, but like the other listed statutes, these two statutes also have provisions that ban discrimination in activities other than employment. Section 608(d) thus falls far short of creating a "clearly expressed congressional intention" to preempt Title VII, the preemption standard correctly adopted by the court below. Pet. App. A26 (quoting *Morton v. Mancari,* 417 U.S. 535, 551 (1974)).

Furthermore, as the court of appeals decision explains, the no preemption conclusion is supported by the regulations implementing the PRWORA non-discrimination provision that have been issued pursuant to notice and comment by the two federal agencies responsible for PRWORA administration, DOL and the United States Department of Health and Human Services. *See* Pet. App. A31-35. These regulations deserve deference. As the court of appeals concluded, "[l]egislative regulations issued after notice and comment rulemaking, as these regulations were, are given 'considerable weight'." *Id.* at A32 (quoting *Chevron,*

U.S.A., Inc. v Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984)).

Additionally, as the court of appeals decision also explains, Pet. App. A29-31, the no preemption conclusion is supported by PRWORA's legislative history. In May 1997, DOL issued a guide implementing PRWORA indicating that the FLSA and federal anti-discrimination laws "apply to welfare recipients as they apply to other workers. The new welfare law does not exempt welfare recipients from these laws." DOL Guide, *How Workplace Laws Apply to Welfare Recipients*, at Q&A No. 1 (May 1997, revised Feb. 1999), *available at* http://www.dol.gov/asp/w2w/welfare.htm (last visited Nov. 28, 2004). Congress subsequently considered but did not enact a provision specifically designed to override this part of the DOL Guide. Pet. App. A30-31. As the court of appeals stated, the failure of Congress to act when it had knowledge of DOL's interpretation suggests that DOL's interpretation is correct. *Id.* at A31.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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